

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
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290A

Brief for Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 22 1969

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CLERK

No. 22,495

BERNARD L. MOORE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL TO REVIEW AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Harvey M. Spear
1420 New York Avenue, N.W.
Washington, D. C. 20005

Attorney for Appellant

(I)

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(II)

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(III)

QUESTIONS PRESENTED

- I. Did the District Court err in denying appellant's §2255 motion to vacate and set aside his sentence in light of the evidence establishing appellant's incompetence to stand trial?
- II. Did the District Court err in denying appellant's §2255 motion to vacate and set aside his sentence in light of evidence establishing appellant's incapacity for exercising that "greater degree of awareness" prerequisite to the entry of a guilty plea?
- III. Did the District Court err in denying appellant's §2255 motion to vacate and set aside his sentence in light of the impossibility, under the circumstances herein, of making a retrospective determination with respect to appellant's competence to stand trial or capacity for exercising that "greater degree of awareness" prerequisite to the entry of a guilty plea?

(iii)

(IV)

STATEMENT OF ISSUES

- I. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S \$2255 MOTION TO VACATE AND SET ASIDE HIS SENTENCE IN LIGHT OF EVIDENCE ESTABLISHING APPELLANT'S INCOMPETENCE TO STAND TRIAL.

The evidence of record established that appellant was incompetent to stand trial.

- II. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S \$2255 MOTION TO VACATE AND SET ASIDE HIS SENTENCE IN LIGHT OF EVIDENCE ESTABLISHING APPELLANT'S INCAPACITY FOR EXERCISING THAT "GREATER DEGREE OF AWARENESS" PREREQUISITE TO THE ENTRY OF A GUILTY PLEA.

- A. The degree of awareness required of appellant for the entry of a guilty plea is greater than that required of appellant with respect to his competence to stand trial.
- B. The evidence of record establishes that appellant was incapable of exercising that "greater degree of awareness" prerequisite to the entry of a guilty plea.

- III. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S \$2255 MOTION TO VACATE AND SET ASIDE HIS SENTENCE IN LIGHT OF THE IMPOSSIBILITY UNDER THE CIRCUMSTANCES HEREIN OF MAKING A RETROSPECTIVE DETERMINATION WITH RESPECT TO APPELLANT'S COMPETENCE TO STAND TRIAL OR CAPACITY FOR EXERCISING THAT "GREATER DEGREE OF AWARENESS" PREREQUISITE TO THE ENTRY OF A GUILTY PLEA.

The evidence of record establishes that it is impossible today to make a retrospective determination with respect to appellant's competence to stand trial or capacity for exercising that "greater degree of awareness" prerequisite to the entry of a guilty plea.

The pending case was previously before this Court under the title Bernard L. Moore v. United States of America, No. 19,901 and No. 20,937.

(V)

REFERENCES AND RULINGS

This is an appeal by Bernard L. Moore to review an order of the United States District Court for the District of Columbia, dated September 11, 1968, denying, after an evidentiary hearing, his pro se motion under 28 U.S.C. §2255 to vacate and set aside his sentence. Appellant's pro se motion under 28 U.S.C. §2255 was previously filed and denied, without a hearing, on September 23, 1965.

The grounds for this motion were that (1) appellant was incompetent at the time of his trial, (2) appellant was insane at the time of the alleged crime, and (3) appellant's plea of guilty to manslaughter was entered involuntarily, improvidently and without understanding.

A notice of appeal from the order entered on September 23, 1965, was filed in this Court on October 8, 1965 (No. 19,901).

On January 6, 1966, this Court entered an order in No. 19,901 (1) granting appellant leave to appeal in forma pauperis, (2) appointing Harvey M. Spear, Esq. to represent appellant and (3) directing the Clerk of the District Court to transmit to this Court the record on appeal. On January 14, 1966, the record on appeal in No. 19,901 was docketed with this Court.

On May 2, 1966, this Court granted appellant's motion for an extension of time to file appellant's brief in No. 19,901 to a date which was 25 days after the disposition by the District Court of a motion thereafter to be made before it by appellant.

On January 26, 1967, appellant filed in the District Court a motion for a hearing on his pro se motion to vacate and set aside his sentence which had been filed and denied on September 23, 1965.

On February 28, 1967, the District Court denied, without a hearing, appellant's motion of January 26, 1967 for a hearing on the \$2255 motion to vacate and set aside his sentence, which had been filed and denied on September 23, 1965.

A notice of appeal from the order dated February 28, 1967, was filed on March 16, 1967 (No. 20,937). On March 29, 1967, the District Court entered an order granting appellant leave to appeal in forma pauperis in No. 20,937. The record on appeal in No. 20,937 was docketed with this Court on April 25, 1967.

On May 11, 1967, this Court granted appellant's motion of May 8, 1967 to consolidate Nos. 19,901 and 20,937 on appeal.

On January 15, 1968, an order of this Court was entered in Nos. 19,901 and 20,937, reversing the orders of the District Court wherein appellant's motions of September 23, 1965 and of January 26, 1967 had been denied, and remanding this case to the District Court for an evidentiary hearing with respect to appellant's competence to stand trial at the time he entered his guilty plea.

The District Court conducted hearings on May 3 and June 28, 1968. At the conclusion of the June 28, 1968 hearing the District Court, although denying appellant's \$2255 motion from the bench, nevertheless directed appellant and appellee to file proposed findings of fact and conclusions of law.

On September 3, 1968, appellee filed its proposed findings of fact and conclusions of law and on September 9, 1968 appellant filed its amendments to the findings of fact and conclusions of law proposed by appellee.

On September 11, 1968, the District Court filed an order denying appellant's §2255 motion to vacate and set aside his sentence which order is now the subject of this appeal.

A notice of appeal from the order, dated September 11, 1968, was filed on September 30, 1968. The record on appeal was docketed with this Court, on November 12, 1968, as case No. 22,495.

Appellant's time to file this brief was extended to August 22, 1969, by orders of this Court, dated January 2, January 27, April 25, May 27, and July 28, 1969.

This Court has jurisdiction over appellant's appeal pursuant to 28 U.S.C. §1291.

(VI)

STATEMENT OF THE CASE

At about 6:00 p.m., on Sunday, September 9, 1962, an unidentified and fatally wounded white female was found lying unconscious in a wooded area near 6th and Pennsylvania Avenue in Northeast Washington (Coroner's Tr. 2).*

At 7:15 p.m., the victim, later identified as Barbara Ann Parks, was pronounced dead (Coroner's Tr. 3).

At 9:00 p.m., an autopsy was performed (Trial Tr. 86). The autopsy showed that the fatal wound had been inflicted by a "sharp instrument" and that death had occurred instantaneously and at some time between 7:00 p.m., on Saturday night, September 8, 1962 and 7:00 a.m., on Sunday morning, September 9, 1962 (Trial Tr. 87-88, 90, 94-96). Appellant was arrested at about 1:35 p.m., the following day, Monday, September 10, 1962 (Trial Tr. 245).**

* The transcript of the Official Inquest before Coroner Richard L. Whelton, M.D., on September 12, 1962, Case No. 28-850, will be referred to as "Coroner's Tr." This transcript was also marked as Exhibit 1 at the evidentiary hearing in the District Court on May 3, 1968.

** Appellant alleges that he requested, but was not advised of the charges against him at the time of his arrest (Trial Tr. 245-246), was not advised during his interrogation by the police of his right to counsel, of his right to a preliminary investigation before a magistrate, of his right to remain silent or of the fact that any statement made by him might be used against him (Trial Tr. 229-230, 262). Moreover, appellant testified as to the circumstances whereby after the police beat him and forced him to take a series of lie detector tests (Trial Tr. 245-269) the police coerced him into signing a written confession (in which he referred to a sequence of events in which decedent died as an "accident", in which, "not realizing" he had a knife in his hand, he "unintentionally" cut or "stabbed" decedent when he swung at her in response to being struck in the face by her with a rock [Trial Tr. 204, 282; September 18, 1963 Tr. 7]).

On October 15, 1962, a one-count indictment was filed in the District Court for the District of Columbia in Cr. Action No. 872-62, under D.C. Code §22-2401, charging appellant with first degree murder of one Barbara Ann Parks on or about September, 1962.

On January 9, 1963, the District Court, sua sponte, entered an order that appellant be given a mental examination by Legal Psychiatric Services.

On January 10, 1963, Dr. Nicholas S. Ionedes, Chief, Legal Psychiatric Services, wrote a letter to the District Court advising it that he believed appellant to be competent to stand trial, but recommending that appellant be committed to St. Elizabeths Hospital ("St. Elizabeths") for a complete and thorough examination to determine his sanity at the time of the crime.

On January 15, 1963, the District Court entered an order, committing appellant to St. Elizabeths, for no more than ninety days, for further examination as to his competence to stand trial and with respect to his sanity at the time of the crime's commission.

Appellant was a patient at St. Elizabeths from January 16, 1963 until April 17, 1963 (Exhibits 2 and 9*).

During their examination of appellant, members of the St. Elizabeths' medical staff learned that appellant was born in 1932 (Exhibit 8, page 1), was unable to dress himself at the age of 10 (Exhibit 5, page 1), failed third grade twice (Exhibit 2, page 3),

* All references to exhibits are to those exhibits admitted into evidence at the evidentiary hearings held on May 3 and June 28, 1968.

stopped school in the fifth grade at age 11 or 12 because he had trouble understanding things (Exhibit 2, page 3), was "odd from the rest" of his brothers and sisters and was "forgetful", "highly nervous" and "quick to become upset or irritated" (Exhibit 3, page II), was frequently beaten by his father--more so than his brothers or sisters--because he had trouble understanding things (Exhibit 2, page 3 and Exhibit 5, page 1), ran away from home at age 14 because his father beat him (Exhibit 2, page 3), returned home two years later at age 16 after having worked at odd jobs (Exhibit 2, page 3), left home a year later, travelling repeatedly between New York City and Baltimore while working at various laboring jobs (Exhibit 2, page 3), and was rejected for military service because, so appellant stated, he failed certain psychological tests (Exhibit 8, page 2).

The members of the St. Elizabeths' medical staff learned that appellant remained at home from 1951 until 1959 except during the periods when he was serving prison sentences (Exhibit 5, page 1), that appellant was convicted of unlawful assault in 1953* and in 1957 and for drunk and disorderly conduct on several occasions

* In a letter, dated February 12, 1963 from the Division of Corrections, State of Virginia, Richmond, Virginia, members of the St. Elizabeths' medical staff learned that the Division of Corrections where appellant had been incarcerated from 1953-1955, had found appellant to be of "borderline intelligence - IQ 74" with "poor mechanical aptitudes, clerical skills lacking" and "mental age 11-4". The report also stated that appellant "does not know how to settle an argument without a fight", was "nomadic and unstable and has little regard for the rights of others" and was "... aggressive, impulsive and expansive. ... lacks social concepts and has seemingly allowed a lowered threshold of irritability and situational factors to contribute to

prior to 1962, that appellant, was married in 1959, separated from his wife one month thereafter, and lived with her only intermittently after the date of their separation, that he left her for the last time in March, 1961, judging the cause of their poor relationship to be his wife's belief in his in-laws' ill-founded accusations that he was seeing other women, that he had disagreements with his wife which often ended in physical fights and that he drank more heavily after leaving his wife in 1961 (Exhibit 2, pages 3-4).

As to appellant's medical history, members of the St. Elizabeths' medical staff learned that appellant's left eye was burned in a lime accident in 1947 when he was 14 years old, that in 1953, at age 21, appellant suffered serious injuries to his skull and spine when a lumber truck toppled over and pinned him inside, that he began to have serious and painful headaches a short time after he was injured in the 1953 truck accident (Exhibit 2, page 4 and Exhibit 3, page III), that he had had painful headaches continually subsequent to that time (Exhibit 2, page 1) and that his headaches had worsened in the 16 months prior to January 1963 (Exhibit 2, page 2). (During his stay at St. Elizabeths Hospital, appellant was given "Equanil" and "Zactirin" for his headaches and from March 3 to March 21, 1963 was given medication of Meproamate, 800 milligrams, three times daily, because of

* (Continued from page 7.)
his offense. His attitude is fair, but the prognosis for the future is indeterminate." (Exhibit 6)

headaches and resulting tension (Exhibit 8, page 2 and Exhibit 9, page 5*)

Members of the St. Elizabeths' medical staff also learned that there was a significant history of mental illness in appellant's family (Exhibit 3, page I), that, as of August, 1962, appellant feared the dark, slept with the lights on, complained of seeing things in the dark but feared describing them (Exhibit 5, page 2) and had agreed, on the day prior to his arrest in September, 1962, to go to St. Elizabeths for examination (Exhibit 3, page III).

In a report, dated April 6, 1963, Dr. Eugene C. Stammeyer, a psychologist, noted that appellant showed "some physical signs suggesting organic central nervous system disease" (Exhibit 7, page 1).**

* At the June 28, 1968 hearing, expert testimony was given to the effect that such a high dosage of medication would only be given to a patient who was "markedly agitated and disturbed" (June 28, 1968 Tr. 137).

** Dr. Stammeyer, who had given appellant a series of intelligence tests, also stated in that report that:

"The overall test picture points to a basically passive, dependent, insecure individual who has probably always tended to cling to others in a rather helpless, indecisive fashion. Hostile aggressive feelings and sexual impulses seem to have always been inadequately channelized and poorly controlled. At least average intellectual abilities are indicated although Mr. Moore has probably never consistently functioned much beyond the lower extreme of the dull normal range. Under normal conditions he is likely to have appeared simply to be passive, childish, and probably irritable. However, he has probably always been prone to react to frustration with impulsive, non-adaptive, potentially destructive behavior.

In general, the overall test picture seems to describe a long-standing pattern of adjustment characterized by exaggeration of certain personality and behavior reactions and a deficiency in others. However, there are some indications throughout the test material which are consistent with the effects of early organic damage to the central nervous system." (Exhibit 7)

At the Medical Staff Conference on April 9, 1963, appellant stated that "on occasions he [had] had hallucinatory experiences "which he described" as hearing someone call his name when no one [was] present and also at night occasionally seeing a four-legged animal which [he could not] identify" (Exhibit 10, page 2). At that conference, Dr. Stammeyer advised the conference that it was his opinion that although appellant was competent to stand trial, he was mentally ill (June 28, 1968 Tr. 119, 121), and Dr. David H. Dabney, a staff psychiatrist, stated, inter alia, that he held severe doubts with respect to appellant's competence to stand trial (June 28, 1968 Tr. 133, 128; see also Exhibit 31).*

Notwithstanding the factual information developed about appellant and the opinions expressed by Drs. Stammeyer and Dabney concerning appellant's then mental illness, the majority of the Medical Staff Conference decided, inter alia, that appellant was competent to stand trial.

On April 10, 1963, members of the St. Elizabeths' medical staff filed with the District Court a letter report finding that appellant was competent to stand trial and was "not ... suffering

* There is some question as to whether all the hospital reports concerning appellant's hospitalization at St. Elizabeths between January 15, 1962 and April 9, 1963 were reviewed or were, in fact, available for review at the Medical Staff Conference on April 9, 1963 (June 28, 1968 Tr. 119, 142, 157).

a mental disease or defect" at the time of the crime.*

On July 24, 1963, appellant filed a pro se motion to dismiss the indictment on the ground that he had been denied his constitutional right to a speedy trial. In denying this motion on August 2, 1963, the District Court advanced appellant's trial date from October 17, 1963 to September 12, 1963. On August 16, 1963, appellant filed a second pro se motion to dismiss the indictment for denial of a speedy trial, which was denied on August 29, 1963. On September 3, 1963, appellant filed yet a third pro se motion to dismiss the indictment for denial of a speedy trial. This motion was denied on September 12, 1963, when the trial date was adjourned

* The full text of this letter report is as follows:

"Mr. Bernard L. Moore was committed to Saint Elizabeths Hospital on January 16, 1963, for a period not to exceed ninety days, for mental observation.

"Mr. Moore's case has been studied since his admission to the hospital and he has been examined by qualified psychiatrists. On April 9, 1963, Mr. Moore was examined and his case reviewed in detail at a medical staff conference. As a result of our examinations and observations, it is our opinion that Bernard L. Moore is mentally competent to understand the nature of the charges pending against him and to assist counsel in his own defense. It is our opinion that he is not now and was not on or about September 9, 1962, suffering a mental disease or defect."

The form of this report was described as a "conclusionary and uninformative boilerplate" report in Hansford v. United States, 124 App. D.C. 387, 365 F.2d 920, 925 and n.13 (1966). See also Green v. United States, 122 App. D.C. 33, 37 (1965); 351 F.2d 198 (Bazelon, C.J., dissenting)

to September 16, 1963. [(Supplemental Record)].

There is no record of any type of medical or follow-up examination of appellant by the staff of St. Elizabeths (or by any other doctors) during the 5-month period from April 17, 1963, the date of appellant's transfer from St. Elizabeths, to September 16, 1963, the date on which his trial began.

Although appellant's principal attorney, Arthur Jackson, Esq., advised the court on September 16, 1963, that appellant would raise the defense of insanity at the time of the alleged crime, no formal specific objection was made by appellant or his attorney to the St. Elizabeths' report of April 10, 1963 and no motion was made for a competency hearing (Trial Tr. 1-121).

During the trial, the court was advised that appellant had requested "medical treatment for his head", thereafter, had requested "medical treatment and hospitalization" and that appellant had been given aspirin for relief of his pain (Trial Tr. 6,81).

On September 17, 1963, the second day of the trial, the trial judge was advised that appellant had previously refused to enter a plea of guilty to manslaughter.* When the trial judge asked appellant if this were still his desire, appellant responded affirmatively (Trial Tr. 123-125).

That day, Mrs. Rose Moore Williamson, appellant's sister, testified, at great length, about appellant's headaches, lapses of memory, childhood problems and mental deficiencies (Trial Tr. 157,

* At a subsequent hearing, it was described that on May 6, 1963, and on September 12, 1963, appellant had rejected any suggestion that he enter a plea of guilty to manslaughter (December 20, 1963 Tr. 50-61, 64).

168-171).

Later that day, appellant's attorney objected to the Government's offer into evidence of appellant's signed statement ("written confession") obtained upon his arrest on September 10, 1962. After hearing testimony of appellant and police officers outside the presence of the jury (Trial Tr. 189-269), the trial judge ruled on September 17, 1963 that appellant's written confession was admissible (Trial Tr. 269) and it was then read to the jury (Trial Tr. 280-284).

On September 18, 1963, the third day of the trial, appellant's attorney advised the court that appellant was considering entering a plea of guilty to manslaughter.

While appellant was deliberating the question of whether he wished to enter a guilty plea, appellant's attorney advised the Court that he had only that morning learned there was a minority dissenting report to the St. Elizabeth's report of April 10, 1963 (Trial Tr. 298).

After a brief recess was taken, appellant was permitted to enter a plea of guilty to manslaughter and sentencing was adjourned to November 1, 1963. The trial judge questioned appellant about the voluntariness of his plea of guilty. The trial judge asked him if he had discussed his plea of guilty with his attorney and

appellant responded affirmatively (September 18, 1963 Tr. 4). Appellant later testified that this response was untrue (December 20, 1963 Tr. 22-23; see also December 20, 1963 Tr. 49-51, 66-67).

The trial judge also questioned appellant about the details of the alleged crime and especially about the hour the stabbing had occurred. Appellant, in answer to questions from the court, appeared confused in his recollection as to when the alleged crime took place, fixing the time of the stabbing at 1:00 p.m. on Sunday, September 9, 1962* (September 18, 1963 Tr. 6). This answer was clearly incorrect inasmuch as all other testimony in the case, including statements by appellant, fixed the hour at which the stabbing had occurred as no later than 7:00 a.m. on Sunday, September 9, 1962 (Trial Tr. 90, 95, 155-160, 167, 179, 204-205, 281-284).

On September 18, 1963, neither appellant's attorney nor the trial judge inquired into what had prompted appellant to change his mind and to enter a guilty plea in light of his previous refusal to do so (September 18, 1963 Tr. 1-11 and December 20, 1963 Tr. 50, 64).

Within one week after entering his guilty plea, appellant, in a letter to Mr. Jackson, expressed the desire to move to withdraw his guilty plea (December 20, 1963 Tr. 9). Upon receiving a second letter from appellant in early October, Mr. Jackson visited

* In his written confession, appellant stated that the accident had occurred in the early morning when it was still dark on Saturday, September 8, 1962 (Trial Tr. 281).

with him and was advised by him, without explanation, that he wished to withdraw his September 18, 1963 guilty plea (November 1, 1963 Tr. 1 and December 20, 1963 Tr. 9-10).

On November 1, 1963, Mr. Jackson advised the trial judge that appellant had advised him that very morning that he wished to withdraw his pre-sentencing motion to withdraw his guilty plea and desired to be sentenced that morning instead (November 1, 1963 Tr. 4).

Neither the trial judge nor appellant's attorney inquired into why appellant moved to withdraw his guilty plea or why he then changed his mind and decided to withdraw that motion (November 1, 1963 Tr. 1-8 and December 20, 1963 Tr. 66-67).

When asked before sentencing if he had anything to say, appellant requested that the trial judge send him to a "mental hospital" for treatment. The trial judge then responded that this was a matter for "the authorities" (November 1, 1963 Tr. 4). When the trial judge inquired of appellant's need for psychiatric care, he was informed that the St. Elizabeths' report of April 10, 1963 was "in the jacket" and was advised for a second time, that there was a dissenting opinion to the April 10, 1963 report with respect to appellant's competence to stand trial, although it had not been filed with the court. The trial judge was also told that appellant had been in a series of accidents which had required his hospitalization. The trial judge made no further inquiry concerning appellant's mental condition. He then sentenced appellant to 5 to 15 years (although he later reduced appellant's sentence to

3 years 8 months to 14 years on December 17, 1963 (November 1, 1963 Tr. 4-8).

On November 7, 1963, six days after sentencing, appellant moved to withdraw his guilty plea on the grounds, inter alia, that it had been involuntarily given and that his trial counsel had been incompetent. Hearings were held on this motion on December 20, 1963, January 3, 1964, and May 8, 1964, and an order denying the motion was filed by the trial judge on June 30, 1964.

The first record of any medical examination of appellant subsequent to his transfer from St. Elizabeths on April 17, 1963 was the report prepared by Mr. Jesse Jones, Classification Officer at the District of Columbia jail, on December 17, 1963, less than 50 days after appellant, who had asked to be sent to a "mental hospital", had been sentenced, and only 3 days prior to the first hearing on appellant's November 7, 1963 motion. In his report, Mr. Jones noted appellant's claim of "frequent headaches" and made the following diagnosis:

"Subject is below average intelligence and he appears to be quite an assaultive individual when under the influence of intoxicating beverages. Test results indicate that Moore is an emotionally disturbed person with a high level of psychopathic functioning. On the surface it appears that he may become a disciplinary problem while here. The prognosis for adjustment in the community is extremely poor."
(Exhibit 13, pages 4 and 6)*

* Mr. Jones' report of December 17, 1963 (Exhibit 13) was never part of the record before the trial judge during the pendency of the hearing on appellant's November 7, 1963 motion. In fact, the trial judge presumably first learned of the existence of this report when it was admitted into evidence at the evidentiary hearing held on June 28, 1968 (June 28, 1968 Tr. 63, 150)

At the December 20, 1963 hearing, appellant testified that he was not guilty, that he had plead guilty after his confession had been admitted into evidence because he did not know he could appeal a conviction based upon the erroneous admission of his confession, that he did not remember the substance of his colloquy with the trial judge on September 18, 1963 concerning his guilty plea and that his trial counsel had instructed him on September 18, 1963 how to answer the judge's questions in order to have his guilty plea accepted (December 20, 1963 Tr. 6-47). Appellant further testified that he had entered a guilty plea because his legal representation was inadequate and because his mother, in a letter which he received on the morning he entered his plea, had asked him "to get a plea to a lesser charge" and not let his trial "be the cause of her death" (December 20, 1963 Tr. 7, 13-16).*

Mr. Jackson also testified on December 20, 1963 that a psychiatrist was prepared to testify at trial that appellant was "of unsound mind as of the date ...the crime was committed" and that appellant suffered from "schizophrenia - paranoid type" (December 20, 1963 Tr. 63, 65).

* Mr. Jackson testified on December 20, 1963 that he had delivered a letter to appellant on September 18, 1963, but that he did not then know the contents of the letter (December 20, 1963 Tr. 66-67). At the January 3, 1964 hearing, Joseph Gelb, Esq., appellant's other attorney, testified that appellant had "asked us to read the letter ...[but] we refused to read" it (January 3, 1964 Tr. 10).

On April 21, 1964, during the pendency of the hearings on appellant's November 7, 1963 motion, the Assistant Superintendent of Security at Lorton Reformatory filed a request that appellant "be referred for psychiatric examination due to [his] irrational behavior" (Exhibit 14).

At the May 8, 1964 hearing, a letter from appellant's mother was introduced into evidence wherein she wrote that she could not remember what she had said in the September, 1963 letter because she was "out of [her] head" when she wrote it (May 8, 1964 Tr. 6). Appellant also told the trial judge that he had not objected to being sentenced prior to his November 7, 1963 motion because he had been in solitary confinement at the D.C. Jail and "wasn't even in a clear state of mind at the time" (May 8, 1964 Tr. 10). The trial judge then denied appellant's November 7, 1963 motion to withdraw his guilty plea (May 8, 1964 Tr. 11).

On May 21, 1964, prior to the filing of the District Court's order denying appellant's November 7, 1963 motion, the Acting Superintendent of Lorton Reformatory sent a letter marked "URGENT" to Legal Psychiatric Services, asking that appellant be given a mental examination. The enclosed referral report stated, in part, that:

"This man is a cruel and sadistic individual who is believed to be quite dangerous. He feels that he is being persecuted here and constantly complains about being "picked on" and mistreated by the officials, which is not the truth. The Senior Medical Officer feels that Moore is not in command of all his faculties.

"On one particular occasion he had outright threatened to kill an officer and in view of his offense of killing a woman with a knife this threat cannot be taken lightly, particularly since he was face to face with the officer when making this threat.

"His behavior is such that his sanity must be questioned; therefore, I would like to refer this man for your professional opinion in regard to his mental competency.

"Please see attached case history for additional information." (Exhibits 15, 16 and 17)

On June 30, 1964, the trial judge, unaware that appellant had just been referred for psychological evaluation by Legal Psychiatric Services*, entered an order, together with findings of fact and conclusions of law, denying appellant's motion of November 7, 1963 to withdraw his guilty plea.

On July 21, 1964, appellant was examined at the District of Columbia jail by Dr. Thomas M. Mould, Staff Psychiatrist, Legal Psychiatric Services. In a report dated August 5, 1964, Dr. Mould concluded that appellant was "22.5X schizophrenic reaction, chronic

* These prison reports, dated April 21, 1964 (Exhibit 14) and May 19, 21, 1964 (Exhibits 15, 16 and 17), were never part of the record in this case until their introduction into evidence at the evidentiary hearing held on June 28, 1968 (June 28, 1968 Tr. 63, 150).

undifferentiated type" (Exhibit 19).^{*} In a letter, dated August 6, 1964, Dr. Mould stated that:

"Examination of this man at this time revealed that he was suffering from a Schizophrenic Reaction, chronic undifferentiated type, and commitment to a hospital for the care of the mentally ill is recommended." (Exhibit 19; see also Exhibit 18)**

^{*} Had appellant been diagnosed "22.5X schizophrenic reaction, chronic undifferentiated type" at the Medical Staff Conference on April 9, 1963, St. Elizabeths would have found him incompetent to stand trial (June 28, 1968 Tr. 140).

^{**} In response to Dr. Mould's recommendation, appellant was readmitted to St. Elizabeths and in a report dated January 2, 1965, appellant was also diagnosed by Dr. Straty Economon, a staff psychologist at St. Elizabeths as "22.5 schizophrenic reaction, chronic undifferentiated type" (Exhibit 23), and Dr. Economon also stated that:

"The patient has been treated with ataractic medication and is presently on Thorazine, milligrams 100 b.i.d. This represents a decrement from the past, and it is deemed a stable dose for him. He no longer experiences the auditory hallucinations and, indeed, says that he very seldom has headaches...

* * *

"I would say that his judgment is only fair now, although it is poor without ataractic medication. At such times he does become argumentative, hostile and mildly assaultive. His insight has vastly improved: He believes that he is mentally ill and that the medicine has helped him; he does not feel he is capable of functioning in a prison environment, although he tends to be somewhat paranoid about this; moreover, he does not feel he can adequately function in the community at this time.

"There tends to be a mild loosening of associations; coupled with the moderate disorder in affect, as well as his mildly paranoid ideation, I feel that he could best be diagnosed as suffering from a chronic undifferentiated form of schizophrenia. In my opinion he is better integrated at the present time than he has been in recent years, and that continued treatment in this institution is indicated." (Exhibit 23) (Emphasis added)

On December 28, 1964 this court affirmed the District Court's judgment of conviction (Case No. 18,814).

On September 23, 1965, appellant, still a patient at St. Elizabeths, commenced Civ. Action No. 2358-65, by filing a motion under 28 U.S.C. §2255 to vacate and set aside his sentence on the grounds that he was incompetent to stand trial, that he was insane at the time of the offense and that his plea of guilty was entered involuntarily, improvidently and under duress.

In his motion, appellant advised the District Court that, in August, 1964, he had been transferred from Lorton Reformatory to St. Elizabeths Hospital for mental care and treatment. Appellant also asked that the District Court order the production of the St. Elizabeths' dissenting opinion of April, 1963, which disagreed with the conclusion of the April 10, 1963 report wherein appellant was found to be competent to stand trial and sane at the time of the offense.

On September 23, 1965, appellant's §2255 motion was denied by the trial judge*, without a hearing and without opinion, appellant thereafter filing an appeal, No. 19,901.

On January 26, 1967, appellant filed a new motion in the District Court, Div. Action No. 2358-65, requesting a hearing on the §2255 motion previously filed with and denied by the trial

* The appellant's trial judge was also the District Court judge who decided appellant's §2255 motions of September 23, 1965 and January 26, 1967 respectively (Original Records in Nos. 19,901 and 20,937).

judge, on September 23, 1965. In support of this motion, appellant filed two affidavits by Dr. David H. Dabney and Harvey M. Spear, Esq., respectively.

In his affidavit, Dr. Dabney, a member of the psychiatric staff of St. Elizabeths Hospital who participated in the April, 1963 conference relating to appellant's competency and sanity, stated, inter alia, that in April, 1963, he had concluded that appellant "was suffering from paranoid personality with organic factors" and that he had, at that conference, disagreed with the findings in the St. Elizabeths' report of April 10, 1963 that appellant was competent to stand trial and was sane at the time of the offense.

In his affidavit, Mr. Spear submitted detailed evidence of appellant's mental, emotional and intellectual deficiencies, obtained primarily from hospital records not previously made a part of the court records, including evidence of appellant's noticeable inadequacies, both as a child and adult, his series of head injuries which had produced severe and unabating headaches, his continuous trouble with the law for petty violations, his development as a chronic alcoholic and earlier prison diagnoses pointing to his mental instability.

On February 28, 1967, the trial judge entered an order denying, without a hearing and without opinion, appellant's January 26, 1967 motion for a hearing, from which order appellant filed an appeal, No. 20,937.

On January 15, 1968, this Court entered an order remanding appellant's case to the District Court for an evidentiary hearing with respect to appellant's competence to enter a guilty plea.

In a re-admission report dated April 1, 1968, Dr. Earle W. Baughmann, Jr., a psychiatrist at St. Elizabeths, diagnosed appellant as "22.5 schizophrenic reaction, chronic undifferentiated type" (Exhibit 30).*

* The circumstances leading to appellant's transfer back to St. Elizabeths from Lorton Reformatory were described in an affidavit of Mr. D.J. Sheehy, Superintendent, Correctional Complex, Lorton, Virginia, which was filed in support of the Government's motion to dismiss appellant's action challenging his denial of parole (Civ. Action No. 447-68). Mr. Sheehy stated that:

"On December 18, 1967, Mr. Moore was interviewed by Mr. Hall, Institutional Classification Officer. Mr. Moore had recently been denied parole and wanted to know the reason. He was very emotional concerning the Parole Board's action. He was sent to Mr. Garrott, Institutional Parole Officer, who talked to Mr. Moore, relative to the parole denial. A few moments later Mr. Moore returned to the office of Mr. Hall and was even more upset and on the verge of being angry. He stated he was not going to work anymore and wanted to be locked up and transferred to Saint Elizabeths. He became quite angry and cursed a correctional officer and was then escorted to the Captain's Office and placed in the Control Cells. Mr. Moore stated that the institutional staff was against him and that he [was] being persecuted by everyone. He had made verbal threats to do harm to someone if he is not transferred to another institution.

"Mr. Moore was seen by the psychiatrist at Legal Psychiatric Services, who determined that he [was suffering] from a mental condition and that he be transferred to a hospital for the mentally ill for care and treatment. He was evaluated as a rather paranoid man and unable to control his angry, destructive impulses.

"Mr. Moore was transferred from Lorton to the District of Columbia Jail on February 27, 1968 for subsequent transfer to Saint Elizabeths Hospital." (Exhibit 29)

On May 3 and June 28, 1968, the District Court conducted hearings on appellant's \$2255 motion to vacate and set aside his sentence. On May 3, 1968, appellant testified concerning his education, his headaches, his accidents and his drinking (June 28, 1968 Tr. 34-63).*

At the hearing held on June 28, 1968, the District Court heard expert testimony from three psychiatrists (including Dr. Dabney) and one psychologist (Dr. Stammeyer). Dr. Dabney was of the opinion that appellant was incompetent to stand trial on September 18, 1963, the date on which appellant entered his guilty plea (June 28, 1968 Tr. 140-141). Dr. Stammeyer stated that he had no knowledge as to whether appellant was competent or incompetent to stand trial on September 18, 1963 (June 28, 1968 Tr. 124).

Dr. Mauris M. Platkin**, a staff psychiatrist at St. Elizabeths, testified for the government that appellant was competent to stand trial on September 18, 1963, but on cross-examination admitted that he actually had no way of knowing whether appellant was, in fact, competent to stand trial at that time (June 28, 1968 Tr. 161, 167). Another government witness, Dr. Earle W. Baughmann, a staff psychiatrist at St. Elizabeths, was of the opinion that appellant's mental condition had clearly and demonstrably deteriorated during the period from April 9, 1963 (the date of the St.

* This testimony substantially corroborated the background information concerning appellant which St. Elizabeths had previously obtained (See pages 7-11, supra.)

** Dr. Platkin (but not Dr. Baughmann) was present at the Medical Staff Conference of April 9, 1963 (Exhibit 10)

Elizabeths' finding of "competency") to August 6, 1964 (the date of Dr. Mould's finding of "22.5X schizophrenic reaction, chronic undifferentiated type") and that, in view of such deterioration and the absence of any contemporaneous examination of appellant at or around the time of trial, he could not say appellant was competent to stand trial on September 18, 1963 (June 28, 1968 Tr. 91, 93).

On June 28, 1968, the District Court denied appellant's §2255 motion from the bench, but directed appellant and appellee to file proposed findings of fact and conclusions of law. On September 3, 1968, appellee filed its proposed findings of fact and conclusions of law and, on September 9, 1968, appellant filed his amendments to the findings of fact and conclusions of law proposed by appellee.

On September 11, 1968, the District Court filed its order denying appellant's §2255 motion to vacate and set aside his sentence.

(VII)

ARGUMENT

I

THE DISTRICT COURT ERRED IN DENY-
ING APPELLANT'S §2255 MOTION TO
VACATE AND SET ASIDE HIS SENTENCE
IN LIGHT OF EVIDENCE ESTABLISHING
APPELLANT'S INCOMPETENCE TO STAND
TRIAL*

In the instant case, appellant will show that the District Court erred in failing to grant his §2255 motion to vacate and set aside his sentence in light of evidence establishing appellant's incompetence to stand trial. The motion to vacate and set aside appellant's sentence under 28 U.S.C. §2255 was an appropriate method for appellant to attack his conviction and sentence on the ground that he was incompetent to stand trial. Floyd v. United States, 365 F.2d 368 (5th Cir., 1966).

Where a defendant is incompetent at the time of trial, his conviction and sentence constitutes a denial of a fair trial and of due process of law. Bishop v. United States, mem., 350 U.S. 961, 100 L.ed. 835, 76 S.Ct. 440 (1956). A convicted defendant bears the burden of proving that he was incompetent to stand trial in a proceeding to vacate and set aside his sentence. United States v. Bostic, 206 F.Supp. 855 (D.C.D.C., 1962), affirmed 115 App. D.C. 79, 317 F.2d 143 (D.C. Cir., 1963).

* With respect to Argument I, appellant desires that the Court read the following pages of the transcripts: Trial Tr. 6, 65-66, 81-82, 87, 90, 95, 123-125, 155-160, 167-169, 179, 204-207, 245-269, 281-284, 292 and 298, September 18, 1963 Tr. 6, November 1, 1963 Tr. 1 and 4-6, December 20, 1963 Tr. 9, 17, 50-51 and 64, May 3, and June 28, 1968 Tr. 1-170. 26.

- A. The evidence of record established that appellant was incompetent to stand trial.

The materiality and relevancy of a medical finding of schizophrenic reaction, chronic undifferentiated type to the question of a defendant's competence to stand trial has been generally acknowledged. Floyd v. United States, *supra*; Anderson v. United States, 318 F.2d 815 (5th Cir., 1963); Van De Bogard v. United States, 305 F.2d 583 (5th Cir., 1962).

Where psychiatric reports show, on their face, serious mental conditions existing at a time immediately after a defendant's plea and sentencing, the trial judge may not reach the conclusion of defendant's mental competency solely on the basis of previous ex parte institutional reports. Van De Bogard v. United States, *supra*; Pouncey v. United States, 121 App. D.C. 264, 349 F.2d 699 (D.C. Cir., 1965). Said the Court in Pouncey, *supra*:

"A judge's responsibility to guard against the possibility that an accused person may have become incompetent does not end when the trial begins. A hospital report is only a prediction that when the accused is tried he will be able to participate adequately in the proceeding. Later developments may throw doubt on the prediction, particularly when... the report does not show the hospital's understanding of 'competence', the tests it employed, or the certainty of its diagnosis." [at p. 700]

Where there are no records or medical findings of defendant's competency, contemporaneous with his trial, the court must look to that evidence of defendant's competency which preceded or succeeded defendant's trial. Kibert v. Peyton, 383 F.2d 566 (4th Cir., 1967); United States v. Valentino, 201 F.Supp. 219 (E.D.N.Y., 1962).

Where the court record does not sufficiently support a finding of defendant's competence to stand trial, the court will grant defendant a new trial. Dusky v. United States, 362 U.S. 402, 4 L.ed. 2d 284, 80 S.Ct. 788 (1960). There, the Court, quoting a suggestion of the Solicitor General said:

"...it is not enough for the district court judge to find that 'the defendant[is] oriented to time and place and [has] some recollection of events', but...the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he had a rational as well as factual understanding of the proceedings against him.'" [L.ed., at p. 835]

There is no medical evidence herein, in the form of psychiatric reports or other findings, which was contemporaneous with appellant's trial. That evidence of earliest date which was used to determine appellant's competence to stand trial is the St. Elizabeths' conclusionary boilerplate report dated April 10, 1963, antedating appellant's trial by more than five months. That evidence of earliest date which clearly found appellant to be incompetent to stand trial was the diagnostic report of Dr. Mould, dated July 21, 1964, postdating defendant's trial and succeeding sentence by less than ten months. The evidence clearly established that appellant's mental condition deteriorated during that period from April 9, 1963, the date on which the Medical Staff Conference found

him competent to stand trial*, to July 21, 1964, the date on which appellant was diagnosed by Dr. Mould as "22.5X schizophrenic reaction, chronic undifferentiated type" (Exhibits 18 and 19), a diagnosis which, if it had been made at the Medical Staff Conference on April 9, 1963, would have resulted in a finding that appellant was incompetent to stand trial (June 28, 1968 Tr. 140).**

* In connection herewith, it is clear that the finding of competency expressed in the St. Elizabeths' boilerplate conclusionary report of April 10, 1963 and filed with the District Court has little probative value in establishing appellant's competency even on that date in that the report (a) did not describe adequately therein appellant's limited education, childhood problems, marital difficulties, accidents, headaches, drinking and his treatment and medication at St. Elizabeths (Exhibits 2-10), (b) did not state the results of Dr. Stammeyer's psychological examination of appellant (Exhibit 7), (c) did not record Dr. Dabney's dissent from the majority's finding as to appellant's competence to stand trial, and (d) did not record Dr. Stammeyer's view that appellant was competent to stand trial, but was mentally ill (June 28, 1968 Tr. 119-121, 124, 137-138, 140-141). See Green v. United States, 128 App. D.C. 408 at 414-416, 389 F.2d 949 at 955-957 (1967) with respect to the date which should be furnished "in substantial detail" concerning a patient in a hospital's pre-trial competency report to the District Court.

** Briefly, the evidence establishing the deterioration in appellant's mental condition subsequent to April 9, 1963, is as follows: (1) the finding of competency in the St. Elizabeths' boilerplate conclusionary report of April 10, 1963; (2) the absence of any medical examination of appellant during the period from April 9, 1963 until December 17, 1963 -- a period which spans appellant's trial (September 16-18, 1963) and sentencing (November 1, 1963); (3) appellant's behavior in prison which so disturbed the prison authorities that they requested evaluation of his mental condition (Exhibits 14-17; see also Exhibit 13); and (4) appellant's eventual return to St. Elizabeths in August, 1964 on the recommendation of Dr. Thomas M. Mould, who, on August 5, 1964, had diagnosed appellant's mental condition as "22.5X schizophrenic reaction, chronic undifferentiated type".

(A finding of competency in a pre-trial examination has decreasingly less significance the further in time it is from the time of trial. See Blunt v. United States, 128 App. D.C. 375, 389 F.2d 545 (1967) where this Court, in ordering a new

It has been judicially recognized that the lack of any medical report contemporaneous with a defendant's trial makes a retrospective determination as to his past competence difficult at best. Hansford v. United States, 124 App. D.C. 387, 365 F.2d 920 (D.C. Cir., 1966). Such are the circumstances here. However, the crux of appellant's argument is that the weight of the evidence herein establishes that the deterioration in appellant's mental condition had reached the point in September, 1963 where appellant was incompetent to stand trial as of that date. Notwithstanding the lack of such contemporaneous evidence, appellant believes that the evidence herein with respect to appellant's behavior after April 9, 1963 and prior to, at and subsequent to his trial together with the prison reports (Exhibits 12-17) and the expert testimony given at the evidentiary hearings on June 28, 1968, clearly establish that appellant's mental condition had so deteriorated at the time of his trial that this Court must now find that appellant was incompetent to stand trial.

On September 16, 1963, the first day of trial, the trial judge was placed on notice that appellant's trial would involve an inquiry into appellant's mental condition, when he was advised that appellant (a) would interpose the defense of insanity (Trial Tr. 6) and (b) had requested "medical treatment for his head", and, thereafter, "medical treatment and hospitalization" (Trial Tr. 81).

** (Continued footnote from page 29.)
trial, noted that the finding as to competency had been made ten months prior to trial.)

On September 17, 1963, the second day of trial, after a hearing outside the presence of the jury, the trial judge ruled that appellant's written confession was admissible into evidence. During that hearing, appellant testified with respect to the coercion and involuntariness of that written confession (Trial Tr. 245-269).

On September 18, 1963, the trial judge was informed of a dissenting report which had been filed by a psychiatrist who was a member of the conference staff of St. Elizabeths and who disagreed with the finding of competence in the boilerplate conclusionary St. Elizabeths' report of April 10, 1963 (Trial Tr. 298).

Shortly thereafter appellant entered a plea of guilty to manslaughter.

Appellant testified, at the May 3, 1968 hearing on his competence to stand trial, that he did not know at any time during the trial or prior to pleading guilty to manslaughter, that there had been a dissenting report or evidence of disagreement among the St. Elizabeths psychiatrists with respect to his competency (May 3, 1968, Tr.45).

Appellant testified at the same hearing that he did not know, at any time during the trial or prior to pleading guilty to manslaughter, that he had a right to ask for a hearing on his competence to stand trial nor did he know, at any time during the trial or prior to pleading guilty to manslaughter, that he had a right to ask for a hearing on whether or not he was sane on the occasion of the crime for which he was indicted (May 3, 1968 Tr. 45).

Nor did appellant know, at any time during the trial or

prior to pleading guilty to manslaughter, that he had a right to raise as a possible defense the question of whether or not he was under the influence of alcohol on the occasion of the crime for which he was indicted (May 3, 1968 Tr. 46). Nor did appellant know, after he had plead guilty to manslaughter, that he had a right to appeal the issue of intoxication to the Court of Appeals (May 3, 1968, Tr. 46).

The test of competence to stand trial, as prescribed by the Supreme Court in Dusky v. United States,^{supra.}, requires that the defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding". Appellant's inconsistency of mind during the course of the trial indicates an inability on his part to have reasonably consulted with counsel with respect to the defenses available to him. He was not apprised of all the facts upon which his defenses could be based nor even of the existence of those very defenses and it is quite plausible to assume that the reason he was not so apprised by either his counsel or the trial judge was the apparently muddled state of mind which he exhibited with respect to even those basic facts as to which he possessed knowledge.

There was substantial testimony at appellant's trial with respect to his drinking before, during and after the occasion of the crime* for which appellant was indicted, which evidence would clearly have supported a defense of intoxication sufficient to preclude the kind of premeditation and intent necessary to permit appellant's

* Since the autopsy revealed that the victim was drunk "for driving purposes" (Trial Tr. 87), it is not illogical to assume that appellant, her companion drinker, was also drunk for driving

conviction on the charge of first degree murder. Bishop v. United States, 71 App. D.C. 132, 107 F.2d 297 (1939). Yet appellant was ignorant of the availability of the defense of insanity and was thus incapable of appreciating that defense to the charges asserted against him. How could appellant cooperate with counsel in presenting those defenses of which he was ignorant and might he have been capable of evaluating those defenses if he had been apprised of their availability? His conduct clearly weighs in favor of his incapacity.

The trial judge questioned appellant with respect to the time and day of the alleged crime and appellant responded, fixing the time of the stabbing at "one o'clock in the afternoon", on Sunday, September 9, 1962. When the trial judge inquired if the crime for which appellant was indicted occurred at "one a.m. in the morning?", appellant corrected him and answered: "No, in the noon, afternoon" (September 18, 1963 Tr. 6). Since every other piece of evidence herein conclusively shows that the time of the stabbing and the victim's subsequent death occurred prior to 7:00 a.m. in the pre-dawn morning of Sunday, September 9, 1962,* appellant's confession, as to the time of victim's death does not even meet the minimal test which was found to be inadequate in Dusky v. United States, supra, of orientation as to the time and place. Especially relevant

* (continued from page 32.)

purposes. Lieutenant Weber testified that after arrest, appellant showed signs "of a man who had been drinking some earlier" (Trial Tr. 206-207). Detective Preston testified that appellant, when he gave his written statement, had the appearance of a person who had perhaps been on a long drunk. (Trial Tr. 292)

** Dr. Linwood L. Rayford, Jr. the Deputy Coroner of the District of Columbia testified that the victim had died between 7:00 p.m. on Saturday, September 8, 1962 and 7:00 a.m. on Sunday morning,

to appellant's confession at trial is the discrepancy between his testimony with respect to the hour of the crime and the victim's subsequent death, as evidenced by a comparison of appellant's guilty plea in open court, and by his written confession, in which he fixed the hour of the crime and subsequent death, as early in the morning, while it was still dark, on Sunday, September 9, 1962 (Trial Tr. 281-284).

Appellant's incompetence to stand trial is evidenced by his post-trial vacillation as to whether or not he desired to withdraw his guilty plea. But one week after entering his guilty plea, appellant, in a letter to counsel, expressed his desire to withdraw his guilty plea (December 20, 1963 Tr. 9). Appellant repeated that request at a conference with Mr. Jackson within two weeks thereafter (November 1, 1963 Tr. 1). These requests were directly antithetical to appellant's earlier position wherein, prior to trial on May 6, and September 20, 1963 (December 20, 1963 Tr. 50-51, 64) he had refused to even consider entering a plea of guilty to a lesser charge, as he, also, did at trial, on September 17, 1963 (Trial Tr. 123-125). Yet, at sentencing, on November 1, 1963, Mr. Jackson advised the trial judge that appellant had, that very morning, informed him that he wished to withdraw his motion to withdraw his guilty plea, and preferred to be sentenced instead.*

* (Continued from page 33.)

September 9, 1962 (Trial Tr. 90, 95). (See also Trial Tr. 65-66, 155-157, 160, 162, 179 and 204-205).

** In this context it should be noted that on November 7, 1963, only seven days after sentencing, appellant filed a post-sentencing motion to withdraw his guilty plea.

When the trial judge then inquired of appellant on the morning of November 1 whether he had anything to say before sentence was imposed, appellant responded:

"Well, the only thing I have to say is I wish you would recommend me to Springfield or somewhere, or a mental hospital or something" (November 1, 1963 Tr. 4)."

The psychological evaluation of appellant, most contemporaneous with trial, is that of a report of Mr. Jesse Jones, Classification Officer, dated December 17, 1963, forty-eight days after the above-quoted colloquy took place. Mr. Jones set forth the following personality evaluation of appellant:

"A disturbed emotional life accompanied by a high level of psychopathic functioning are the outstanding features of personality.

Behavior may be expected to follow a self-defeating, illogical, pleasure oriented principle and highly aggressive pattern with little insight or motivation to improve.

Potential for overall improvement is low, but potential for being a disciplinary problem is high." [Emphasis added]. (Exhibit 13, page 5).

There is no record that Mr. Jones' report was filed with the District Court, when three days later, on December 20, 1963, it commenced hearings on appellant's post-sentencing motion

* The trial judge's response to this request was:

"Well, I am sure the authorities will send you to a proper institution if you need psychiatric care or anything like that, I am sure that will happen. I don't have any jurisdiction or right to tell them where you should go. I might recommend that." (November 1, 1963 Tr. 4) [Emphasis added].

The trial judge was then advised again that there was a St. Elizabeths' dissenting report which disagreed with the finding of competency in the St. Elizabeths' report of April 10, 1963.

of November 7, 1963 to withdraw his guilty plea. Nor is there any record that Mr. Jones' report was thereafter before the trial judge during the pendency of the hearings of appellant's November 7, 1963 motion and prior to the entry on June 30, 1964, of an order denying that motion.

This medical report, most contemporaneous in time with appellant's trial (September 16-18, 1963) and sentencing (October 1, 1963), fixes the deterioration in appellant's mental condition which had taken place since April 9, 1963 and clearly establishes appellant's incompetence to aid in his own defense and, thus, to stand trial. His actions, characterized as "self-defeating and illogical", are conclusive evidence of such incompetence.

Mr. Jones' finding of "psycopathic functioning" was, thereafter, reinforced when the prison authorities at Lorton Reformatory, alarmed by appellant's dangerous behavior, transmitted a letter labeled "urgent", dated May 21, 1964, to Legal Psychiatric Services, requesting an evaluation of appellant's mental condition (Exhibits 15, 16 and 17).

Pursuant to the request of the prison authorities at Lorton Reformatory, Dr. Thomas M. Mould, Legal Psychiatric Services, examined appellant on July 21, 1964 and diagnosed appellant as "22.5X schizophrenic reaction, chronic undifferentiated type" (Exhibits 18 and 19). Based upon Dr. Mould's diagnosis, appellant was returned to St. Elizabeths (Exhibit 20) where that diagnosis was independently confirmed (Exhibit 23).

The succession of events during late 1963 and early 1964 which ultimately led to appellant's return to St. Elizabeths evidenced the decline in appellant's mental condition subsequent to the April 9, 1963 conference at St. Elizabeths wherein appellant was found competent. The evidence clearly weighs in favor of appellant's incompetence to stand trial in late September of 1963.

Additional evidence of such incompetence is to be found in the expert testimony given at the evidentiary hearing with respect to appellant's competence, held on June 28, 1968, whereat Dr. Dabney, one of the conferees at the St. Elizabeths April 9 conference, testified that appellant was incompetent to stand trial during the month of September. That testimony and the testimony of other psychiatrists, referred to below, is more extensively detailed in the second argument herein.

At the evidentiary hearing with respect to appellant's competence, held on June 28, 1968, Drs. Stammeyer and Baughmann testified that they had no way of knowing whether appellant was competent or incompetent to stand trial and Dr. Platkin testified that, although he believed such competence to exist, he had, in fact, no way of knowing whether defendant was competent to stand trial.

Both Drs. Baughmann and Dabney testified at the aforementioned evidentiary hearing that appellant's behavioral pattern and extreme vacillation prior to, during, and subsequent to his trial was consistent with the behavior one would associate with a person diagnosed as "22.5X schizophrenic reaction, chronic undif-

ferentiated type" (June 28, 1968 Tr. 110, 141).^{*} This testimony substantiates Dr. Dabney's belief that appellant was not competent to stand trial and further supports Mr. Jones' psychological evaluation of the appellant which, once again, must be emphasized as the one clinical report with respect to appellant's competence to stand trial which was most extemporaneous in time with the trial itself.

For the above reasons, the District Court erred in failing to grant appellant's motion to vacate and set aside his sentence notwithstanding the weight of evidence in support of appellant's incompetence to stand trial.

Accordingly, this Court must now vacate and set aside appellant's sentence.

^{*} Dr. Dabney also testified that a man diagnosed "22.5X schizophrenic reaction, chronic undifferentiated type" would have been found incompetent to stand trial on April 9, 1963 by the Medical Staff Conference had such a diagnosis been made as of that date (June 28, 1968 Tr. 140).

(VIII)

ARGUMENT

II

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S \$2255 MOTION TO VACATE AND SET ASIDE HIS SENTENCE IN LIGHT OF EVIDENCE ESTABLISHING APPELLANT'S INCAPACITY FOR THAT "GREATER DEGREE OF AWARENESS" PREREQUISITE TO THE ENTRY OF A GUILTY PLEA*

In the instant case, appellant will show that the evidence herein clearly establishes appellant's incapacity for that degree of awareness prerequisite to the entry of a guilty plea.

Where a defendant is incapable of that degree of awareness prerequisite to the entry of a guilty plea, the trial judge must refuse to enter the plea. In re Williams, 104 App. D.C. 18 165 F.Supp. 879 (1958); see McCoy v. United States, 126 App. D.C. 342, 363 F.2d 306 (D.C. Cir. 1966).

- A. The degree of awareness required of appellant for the entry of a guilty plea is greater than that required of appellant with respect to his competence to stand trial.

A "greater degree of awareness" is required of a defendant for the entry of a guilty plea than that which is required of him with respect to his competence to stand trial. Said the Court In re Williams, supra:

* With respect to Argument I, appellant desires that the Court read those pages of the transcripts indicated with respect to appellant's Argument I herein.

"The issues involved in the plea of guilty and the consequences which attach to a plea require a greater degree of awareness than the competency to stand trial. The Court may reasonably find ... that the latter competency may exist and still not feel justified in accepting a plea of guilty on the defendant's behalf." [at p. 881]

A trial judge may exercise discretion in the entry of such a plea, McCoy v. United States, supra, and a number of criteria have been established to aid the trial judge in the exercise of that discretion.

Rule 11 of the Federal Rules of Criminal Procedure provides in part:

"The court may refuse to accept a plea of guilty ... and shall not accept such plea ... without first determining that the plea is made voluntarily with understanding of the nature of the charge...."
[emphasis added]

A Resolution of the Judges of the United States District Court for the District of Columbia, promulgated June 24, 1959, explicitly extended the requirements of Rule 11, altering its discretionary language and making certain of its precepts mandatory:

"IT IS FURTHER RESOLVED, that it is the consensus of opinion of the Judges of this Court that [a] plea of guilty shall be accepted only when the Court is satisfied that he is guilty and that he is entering the plea voluntarily and of his own free will, and with an understanding of his rights, of the charges against him, and the consequences of entering his plea."
[emphasis added]

Chief Judge Bazelon of this Court, in a dissenting opinion in McCoy v. United States, supra, stressed three factors

which must "clearly and affirmatively appear in the record before the trial court [may exercise] its discretion to accept a plea of guilty".

"First, that defendant, advised by counsel, fully understands the significance of his action.

Second, that he is acting intelligently and voluntarily and not as a result of any threats, promises or incapacity.

Third, that there is at least prima facie evidence tending to establish that the defendant committed the crime to which he is pleading guilty."
[at p. 309]

The denominator common to all the criteria set forth above and prerequisite to a trial judge's entry of a guilty plea is that of voluntariness in the manner in which such plea is made and freedom from coercion in the circumstances which surround it. A coerced plea has been held inconsistent with due process of law. United States v. Tateo, 214 F.Supp. 560 (S.D.N.Y. 1963). Coercion may be of a mental as well as of a physical nature. Waley v. Johnston, 316 U.S. 101, 86 L.ed. 2d 1302, 62 S.Ct 964 (1942); Machibroda v. United States, 368 U.S. 487, 5 L.ed. 2d 808, 81 S.Ct. 806 (1962).

In considering whether a guilty plea is voluntarily made, the trial judge should look to the totality of circumstances surrounding it. Smiley v. Wilson, 378 F.2d 144 (9th Cir. 1967). This totality or attendant circumstances criterion under which defendant labors at the time of making his guilty plea is best set forth in United States v. Tateo, supra, which is quoted herein at

length:

"The issue of whether the guilty plea was in fact voluntary or the product of mental coercion cannot be determined with mathematical precision. Of necessity we deal in probabilities in deciding whether the defendant, at the time he pled guilty, had that free will essential to a reasoned choice either to continue with the trial or to enter a plea of guilty. Its determination involves an evaluation of psychological factors and elements that may be reasonably calculated to influence the human mind, and while probing the human mind is beyond the ken of the average layman and indeed that of the average judge, the issue of the state of a man's mind is to be decided by the trier of the fact, whether court or jury, just as any other fact issue - the reasonable inferences to be drawn from all the surrounding facts and circumstances." [at p. 565]

Thus, inquiry is proper with respect to the possibility of the inducement for a guilty plea overcoming a defendant's ability to make a voluntary decision. Hulitt v. Sigler, 242 F. Supp. 705 (D.C. Neb. 1965). Inquiry is proper with respect to the affect of a coerced confession on the voluntariness of a subsequent guilty plea, Smiley v. Wilson, supra.

The criteria for determining mental coercion with respect to a guilty plea would appear to be no different from those applied to mental coercion with respect to a defendant's confession. United States v. Tateo, supra; Machibroda v. United States, supra; Waley v. Johnston, supra.

In Fikes v. Alabama, 352 U.S. 191, 1 L.ed. 2d 246 at 250-251, 77 S.Ct. 281, (1957), the totality of circumstances surrounding the voluntary nature of a confession was held to include the fact that "the prisoner was an uneducated Negro, certainly of low mentality,

if not mentally ill." In Spano v. New York, 360 U.S. 315, 3 L.ed. 2d 1265, 79 S.Ct. 1202, (1959), the totality of circumstances was held to include defendant's "history of mental instability."

In the Fikes decision, supra, Justice Warren, in holding that the totality of circumstances went beyond the "allowable limit," quoted a prior Supreme Court decision, Stein v. New York, 346 U.S. 156, 97 L.ed. 1522, 73 S.Ct. 1077 (1953) wherein it was said:

"The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."

Justice Warren then continued in his own words:

"That is the same standard that has been utilized in each case, according to its total facts. Cf., e.g. Watts v. Indiana, 338 U.S. 49 ...; Lyons v. Oklahoma, 322 U.S. 596 ... We hold that the circumstances of pressure applied against the power of resistance of this petitioner, who cannot be deemed other than weak of will or mind, deprived him of due process of law." [at pp. 197-198]

- B. The evidence of record establishes that appellant was incapable of demonstrating the degree of awareness required of him for the entry of a guilty plea.

Appellant intends to prove and the totality of circumstances herein will establish that, at the time appellant pled guilty to manslaughter, he so labored under mental stress as to be incapable of demonstrating the "greater degree of awareness"

prerequisite to entry of a guilty plea. Further, appellant was or so believed himself to be the subject of physical and mental coercion as to be rendered incapable of exercising free will and independent judgment. Such incapacity rendered his plea involuntary, thereby leaving unfulfilled the fundamental prerequisite to its entry.

Appellant is an uneducated Negro who has been found to be of "borderline intelligence - IQ 74" with "poor mechanical aptitudes, clerical skills lacking" and "mental age 11-4." (Exhibit 6). Appellant has been characterized as one of average intellectual ability but has "probably never consistently functioned much beyond the lower extreme of the dull normal range (Exhibit 7, page 2). Such findings are consistent with that regarding the defendant in Fikes v. Alabama, supra, wherein defendant's confession was rejected and judgment reversed.

Appellant, at age 14, suffered burns to his eyes; was subsequently rejected from military service for allegedly psychological reasons; thereafter suffered skull fracture and serious injury to the spine; and subsequently suffered painful headaches (Exhibit 2, page 4; Exhibit 3, page III) which continued (Exhibit 2, page 1) and became worse in the sixteen months prior to January, 1963. (See Exhibit 2, page 2 wherein appellant stated to Dr. Glenn D. Leglar in January, 1963 that such headaches were constant but always worse at night; that throbbing pain began in the left eye, radiated along the left side of his head above the left ear; that he suffered dizziness and nose bleeds; that drinking would stop the

headaches but precipitated instead the sensation of a grinding noise in his ears).

Appellant was administered "Equanil" and "Zactirin" and, from March 3 to March 21, 1963, was administered 800 milligrams of Meproamate, three times daily, due to headaches and resulting tension (Exhibit 8, page 2; Exhibit 9, page 5). Medical testimony indicates that such a dosage is administered only to a patient who is "markedly agitated and disturbed." (June 28, 1968, Tr. 137).

Appellant's family exhibits a significant history of mental illness (Exhibit 3, page 1). As of August, 1962, appellant demonstrated a fear of the dark, slept with the lights on, complained of things in the dark which he feared to describe (Exhibit 5, page 2).

Appellant's behavior was diagnosed on April 6, 1963 as showing:

"some indications ... consistent with the effects of early organic damage to the central nervous system.... There is some suggestion, particularly in the area of visual - motor functioning, of the effects of incipient organic damage to the central nervous system. The patient was prone to lose sight of his goal and occasionally his response to the performance items became outright disorganized and confused.... There is some indication of perseverative thought processes ... consistent with the effects of organic brain pathology. [emphasis added] (Exhibit 7, page 1),

and on April 9, 1963 appellant was diagnosed as mentally ill (June 28, 1968, Tr. 119, 121).

Appellant admitted, on April 9, 1963, hearing someone call his name when no one was present and, also, at night,

occasionally seeing an unidentifiable four-legged animal (Exhibit 10, page 2).

Such is appellant's medical history, similar to but more fully documented than that of defendant in Spano v. New York, supra, wherein defendant's confession was rejected, and judgment reversed due to defendant's "history of emotional instability." (In Spano, defendant suffered a cerebral concussion, was found unacceptable for military service, primarily due to "psychiatric disorder," flunked the Army AFQT-1 intelligence test, and had a familial history for mental illness).

The law requires that a defendant be capable of exercising free will and independent judgment if his guilty plea is to be entered. United States v. Tateo, supra.

An early diagnosis of appellant, over a decade prior to his guilty plea, characterized him as

"aggressive, impulsive and expansive ... lacks social concepts and has seemingly allowed a lowered threshold of irritability and situational factors to contribute to this offense ... nomadic and unstable [with] little regard for the rights of others." [emphasis added] (Exhibit 6)

On April 6, 1963, appellant was diagnosed as:

"a very passive, dependent, sensitive, insecure individual whose hostile aggressive feelings and sexual impulses have probably never been adequately integrated into his personality structure. Under normal conditions he is likely to appear helpless, indecisive, and is prone to cling to others for support. However, his judgment is likely to be undependable under stress and intense emotional stimulation or prolonged frustration may release intense emotional

stimulation or prolonged frustration may release intense and poorly controlled hostile aggressive feelings and sexual impulses through destructive behavioral response." [emphasis added] (Exhibit 7, page 2).

The following colloquy between Dr. Eugene C. Stammeyer, Psychologist-in-Charge, John Howard Pavillion, who concurred in the competency finding of the April 9, 1963 Medical Staff Conference Report, and counsel for appellant, took place at the recent post-sentencing hearing on appellant's competency with respect to the April 9, 1963 Medical Staff Conference Report:

A. ... There was a dissenting opinion, I believe, regarding mental illness.

Q. Whose was that?

A. It was my opinion that he was mentally ill and I don't recall whose else.

Q. Will you tell us what you mean by mentally ill?

A. I felt that Mr. Moore had - well, my diagnosis was of a passive dependent person. I thought this young man was pathologically dependent upon other people, that he had such a limited capacity for independent adjustment in the community that he should be considered mentally ill.

Q. Would you say that he also was not capable of independent judgment in all circumstances?

A. In all circumstances?

Q. Yes

A. I would say that.

Q. Would you say he was capable in all circumstances in exercising reasonable judgment in his own best interest.

A. Not in all circumstances, no sir. (Tr. p. 119, 120;

On April 19, 1963, a dissenting opinion to the Medical Staff Conference Report was expressed by Dr. David H. Dabney to the effect that appellant was incompetent to stand trial and further, that appellant was suffering from paranoid personality with organic features.

The following colloquy between Dr. Dabney and counsel for appellant took place at the recent post-sentencing hearing on appellant's competency:

Q. Now, one other thing. Having heard the record of Mr. Moore's actions between April 9, 1963 and September 18, 1963, are you in a position to express an opinion as to [whether] Mr. Moore was or was not competent on September 18, 1963?

A. Yes, I am.

Q. What is your opinion?

A. Well, that would indicate to me bizarre, deviate, confused behavior and would raise in my mind the feeling that he wasn't competent.

The Court: What would be bizarre?

A. The bizarreness of it, sir, would be the self-defeating actions of the individual, at one point wants to do this and the next moment something else, all involving a vital serious issue effecting his life and his future. It indicates to me the questionableness of his

reasoning and judgment, that is, it is being impaired to the point he can't really make a determining or binding decision for his own welfare or best interests. [emphasis added] (Tr. p. 140, 141).

Such was the psychological state of appellant during the six months preceding the entry of his guilty plea, attested to by written and oral findings of a psychologist who found appellant competent and by oral testimony of a psychiatrist who doubted appellant's competence on April 3, 1963, but who subsequently believed him to be incompetent the following September, when appellant's plea was entered. Such findings would appear far more damning with respect to appellant's capacity to plead guilty than those upon which defendant's confession was invalidated in Spano v. New York, supra. (There, Spano was medically diagnosed as "an extremely nervous, tense individual who is emotionally unstable and maladjusted.")

A number of other factors in the totality of circumstances attendant to appellant's guilty plea militated against the plea's rightful entry. These factors involve (1) appellant's confession; (2) appellant's vacillation with respect to his plea; (3) the affect of the inducement of a manslaughter plea on appellant; and (4) the trial court's failure to adequately investigate appellant's capacity for so pleading.

(1) Appellant's confession was obtained, a lie detector test undertaken and its alleged findings made known, all prior to appellant's booking, indictment, and representation by legal

counsel. The facts surrounding the beating of appellant are controverted. (Tr. 9/17/63, p. 261). Testimony by appellant alluding to his brother's threatened apprehension as an accessory if appellant did not confess is also present in the record (Tr. 9/17/63, p. 266). Whether or not such beatings and/or threats occurred is important in that if either were substantiated, it would be sufficient to vacate appellant's conviction. Blackburn v. Alabama, 361 U.S. 199, 4 L.ed. 2d 242, 80 S.Ct. 274 (1961); Spano v. New York, supra.

Of greater importance to this discussion, however, is the affect of the introduction of this confession, which appellant believed to have been coerced, into evidence. Said the Court in United States v. Tateo, supra:

"It can hardly be questioned but that most persons on trial upon criminal charges are in a state of mental tension and great apprehension. Cf. United States v. Kahaner, 203 F.Supp. 78. This strain is deepened as the trial progresses and as evidence supporting the charges is offered by the Government. This subjective reaction cannot be disregarded in appraising whether or not the defendant had the required free will of mind at the time of his guilty plea." [at p. 565]

Certainly, the introduction of appellant's own confession over testimony with respect to the coercive circumstances surrounding it affected the voluntariness of his subsequent plea. The possible nexus between the two is supported by the opinion in Smiley v. Wilson, supra.

(2) On December 18, 1963, the third day of trial, appellant after refusing to plead anything but innocent to the

charges alleged, expressed a willingness to plead guilty to manslaughter. Within one week of the plea's entry, appellant requested that his plea be withdrawn. On November 1, 1963, a hearing was held on appellant's request to withdraw his guilty plea whereupon the Court was advised that appellant desired to withdraw his request for the withdrawal of the plea. The Court proceeded to sentence appellant, but within a short period thereafter appellant again requested that his plea be withdrawn.

One of the three requisites to the valid entry of a guilty plea is evidence that the plea is made voluntarily, with understanding, and not as a result of incapacity. [per Bazelon, J., dissenting in McCoy v. United States, supra.

On September 18, 1963, appellant pled guilty to manslaughter, described his role in the crime alleged, and was questioned thus:

The Court: Were you out in the location the night that this woman was killed as the Government contends you were - or the morning? What time did it happen?

Defendant: It was about - let me see.

Court: Approximately. I don't need the exact time?

Defendant: Well, one a.m. in the morning.

Court: One a.m. in the morning?

Defendant: No, in the noon, afternoon.

Court: This was on September 9, was it?

Court: Increase the volume of the microphone.
Speak up a little bit more. About one
o'clock in the afternoon?

Defendant: Yes, sir (Tr. 9/18/63, p. 6)

As heretofore set forth in Argument I herein, it was impossible for appellant to have committed the act alleged, at the hour stated above. Such an hour controverts the coroner's report placing the time of death between 7:00 p.m. the previous evening and 7:00 a.m. on the morning of the same day [Tr. 9/16/63, p. 95]. Such an hour controverts appellant's sister's testimony with respect to appellant's activities [Tr. 9/17/63, p. 155]. Such an hour controverts appellant's own prior confession read into evidence. [Tr. 9/17/63, pp. 281-282]

On November 1, 1963, appellant withdrew his "motion" for the withdrawal of his plea and requested instead that he be sentenced. This colloquy between appellant and the Court follows:

Court: Do you have anything to say before
sentence is imposed in this case?

Defendant: Well, the only thing I have to
say is I wish you would recommend me
to Springfield or somewhere, or a
mental hospital, or something.

Court: A mental hospital?

Defendant: Yes.

It is not contended that extracts from a trial transcript, lifted out of context, will, in and of themselves, establish appellant's incapacity to plead guilty. It is most strenuously contended that such extracts, when viewed in the "totality of circumstances" attendant to appellant's plea, are symptomatic

of a "disorganized and confused" state of mind (an analysis previously attributed medically to appellant) which so deprived him of the capacity for independent judgment as to render his plea involuntary.

(3) When determining whether appellant exercised free will in pleading guilty to a lesser charge, due regard must be given to the affect which the inducement had on the "voluntary" nature of appellant's plea. The nexus between the two has been judicially recognized. Hulett v. Sigler, supra. There, the Court said:

"... the more proper inquiry is whether the inducement for the guilty plea was one which necessarily overcame the defendant's ability to make a voluntary decision." [at p. 707]

Appellant's "ability to make a voluntary decision" has been subjected to serious medical question, his behavior having been characterized as "pathologically dependent upon other people" and of "such limited capacity for independent adjustment ... that he should be considered mentally ill." Certainly the "power of resistance" of appellant "cannot be deemed other than weak of will or mind," a characterization which in Fikes v. Alabama, supra, was considered sufficient to have deprived defendant therein of due process of law.

(4) The Resolution of the Judges of the United States District Court for the District of Columbia requires that a guilty plea be entered only after "the Court is satisfied ... that [defendant is entering the plea] voluntarily and of his own free will. ..."

The many factors, psychological as well as physical, which constitute voluntariness and free will with respect to appellant's plea have been discussed at some length.

It is a matter of record that the trial judge, in a number of questions directed at appellant, inquired into appellant's belief in his own guilt and, particularly, into his knowledge of the circumstances surrounding the crime's commission.

The trial judge made peremptory reference to the voluntariness of appellant's plea prior to propounding the questions:

Court: If he pleads guilty to manslaughter before me after I propound certain questions to him, that is final. I will not permit you to withdraw it tomorrow or the next day. Do you understand that?

Defendant: Yes, sir.

Court: This must be voluntarily and freely and willingly done by you. You must be the one to make the decision. Do you understand?

Defendant: Yes.

Court: All right.

[Tr. 9/18/63, 10:20 a.m., pp. 2, 3]

Certainly the above colloquy elicited little with respect to appellant's state of mind than serve to substantiate, in part, that "... he [appellant] is likely to have appeared simply to be passive, childish, and probably irritable." [Exhibit 7, pg. 2] The more important aspects of previous diagnoses went untested:

"However, he has probably always been prone to react to frustration with impulsive, non-adaptive, potentially destructive behavior."
[Exhibit 7, p. 2]

That the trial judge had valid ground to doubt appellant's mental condition is well substantiated by the record, but also recorded therein is the trial judge's lack of concern over that condition. So little concerned was he, in fact, that he had not appraised himself of appellant's competence to stand trial until seventeen (17) minutes prior to accepting his guilty plea.

"Mr. Jackson: One thing while we are here, I was notified this morning there was a minority report from Saint Elizabeths Hospital and I have already called and talked with the Secretary there. Doctor Dabney will be here this morning if we have to go forward and I have a couple of subpoenas here to testify, I told him to be here. I respectfully request Your Honor to sign them.

Court: Did the certificate from Saint Elizabeths - undoubtedly it did state this because this man wouldn't be on trial -

Mr. Jackson: I haven't seen it.

Court: They did certify he was mentally competent?

Mr. Blackwell: It is in the file. I have a copy and I assume it is in the file.

Court: I would think so. You want the subpoenas issued. I will sign them.

[Tr. 9/18/63, 10:03 a.m., pp. 298, 299]

There was little need for the issuance of the subpoenas, however, for the judge's determination that appellant had the "greater degree of awareness requisite to the entry of a guilty

plea" precluded the necessity for Dr. Dabney's testimony.

Had Dr. Dabney testified, the trial judge would certainly have felt constrained to inquire into appellant's psychological capacity for pleading "voluntarily and of his own free will."

The evidence, as demonstrated above, establishes that appellant lacked that very capacity requisite to the entry of a guilty plea.

For the above reasons, the District Court erred in failing to grant appellant's motion, to vacate and set aside his sentence notwithstanding the weight of the evidence in support of appellant's incompetence to stand trial.

Accordingly, this Court must now vacate and set aside appellant's sentence.

(IX)

ARGUMENT

III

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S §2255 MOTION TO VACATE AND SET ASIDE HIS SENTENCE IN LIGHT OF THE IMPOSSIBILITY UNDER THE CIRCUMSTANCES HEREIN OF MAKING A RETROSPECTIVE DETERMINATION AS TO APPELLANT'S COMPETENCE TO STAND TRIAL OR CAPACITY TO ENTER A PLEA OF GUILTY*

In the event that this Court determines that appellant is not entitled to relief under Arguments I or II, supra, this Court must now hold that the District Court erred in denying appellant's motion to vacate and set aside his sentence in light of the impossibility, under the circumstances herein, of making a retrospective determination with respect to appellant's competence to stand trial or capacity to enter a guilty plea.

Where doubts and ambiguities arise from psychiatric testimony as it relates to a retrospective determination of a defendant's competence to stand trial, a §2255 motion to vacate and set aside his sentence will be granted if a nunc pro tunc determination of competency will be clearly impossible. Dusky v. United States, supra; Hansford v. United States, supra.

- A. The evidence of record prior to, during, and immediately after appellant's trial was sufficient to have raised a "substantial doubt" as to appellant's competence to stand trial and capacity to enter a guilty plea and the trial judge erred in failing, sua sponte, to conduct a competency hearing.

* With respect to Argument III, appellant desires that the Court read these pages of the transcripts indicated with respect to appellant's Argument I herein. 57.

It is not necessary to review here all the evidence of record upon which appellant relies and believes establishes (a) his incompetence to stand trial and (b) his incapacity for entering a guilty plea, at the time such events occurred. (See Arguments I and II, supra.)

However, even if this Court does not find that the evidence herein established either appellant's incompetence to stand trial or incapacity to enter a guilty plea, it must find that the trial judge erred in failing to conduct, sua sponte, a hearing with respect to appellant's competence, such failure not being capable of remedy by a nunc pro tunc hearing.

Where a defendant accused his attorney of being "in league with the prosecutor to more or less hurt him", and shortly thereafter, expressed a desire to take the witness stand where he then plead guilty to the charge, it was held that a "substantial doubt" had been raised as to defendant's competence to stand trial. Pouncey v. United States, supra. Said the Court in its opinion therein:

"... [defendant's competency denotes] a reasonable ability to understand the proceedings and comprehend the effect of his actions upon them. Events during the trial cast serious doubt upon appellant's 'ability to consult with his lawyer'. If, as the judge apparently thought, appellant's brash request to enter a guilty plea at the conclusion of his defense was not to be taken seriously, it was a warning of incompetence."

"Recognizing the question to be close on these facts, we nonetheless conclude that the judge should have responded in some way to appellant's erratic behavior." [at p. 701]

As previously detailed herein, appellant vacillated between refusing to plead guilty to a lesser charge, pleading guilty to a lesser charge, moving to withdraw the entry of his guilty plea, and withdrawing his motion to withdraw the entry of his guilty plea. During the course of such vacillation, appellant accused his attorneys of being incompetent (12/20/63 Tr. 13). The instant circumstances are, therefore, analogous to those in Pouncey, supra, wherein the court held that the trial judge erred in failing to conduct, sua sponte, an inquiry into defendant's competency. There is little doubt that the totality of evidence elicited at the evidentiary hearings with respect to appellant's competency was more than sufficient to raise a "substantial doubt" with respect to his competency when compared with that evidence found to raise a "substantial doubt" in the Pouncey, supra, decision. (See also Wider v. United States, 121 App. D.C. 129, 348 F.2d 358 (1965); Hansford v. United States, supra.)

- B. The evidence of record and the testimony elicited at the evidentiary hearing held with respect to appellant's competence to stand trial illustrates the impossibility under the circumstances of making a retrospective determination as to appellant's competence to stand trial.

The testimony elicited at the evidentiary hearing held with respect to appellant's competency failed to remedy the trial judge's omission to conduct, sua sponte, a hearing on appellant's competency and illustrates the impossibility of making a retrospective determination with respect to appellant's competency to stand trial.

An inadequate determination of a defendant's competence to stand trial is not curable by a nunc pro tunc hearing and such a case must be remanded for a new trial preceded by a prior determination of appellant's competency. Dusky v. United States, supra, Wider v. United States, supra. If this Court does not find that the evidence herein established appellant's incompetence to stand trial or appellant's incapacity to enter a guilty plea, it is nevertheless impossible for this Court to find that the evidence herein established that appellant was competent to stand trial or retained the capacity sufficient to enter a guilty plea during September, 1963.

A finding that appellant was competent to stand trial or capable of entering a guilty plea is impossible, under the circumstances herein, because inter alia, (a) there was no medical examination of appellant during the eight month period subsequent to the finding of competence contained in the St. Elizabeth's boilerplate conclusionary report of April 10, 1963 - a period which covered appellant's trial (September 16-18, 1963) and sentence (November 1, 1963); (b) there was no evidence, whatsoever, in the record of any medical examination with respect to appellant's trial and sentencing*; (c) all the medical reports concerning appellant, subsequent to his trial and sentencing, reflected a degree of mental illness which would have precluded a finding of competence to

* Appellant again points out that the December 17, 1963 report of Mr. Jesse Jones (Exhibit 17), commenting, in part, upon appellant's "pathological functioning", is the medical report of record herein which was most contemporaneous in time with appellant's trial and sentencing.

to stand trial or of a capacity sufficient to enter a guilty plea, as of the date of such reports; and (d) there was testimony from expert witnesses at the evidentiary hearing on June 28, 1968, to the effect that they actually and no way of knowing whether appellant was, in fact, competent to stand trial on September 16, 1963 or, in fact, legally capable of entering a plea of guilty on September 18, 1963, the respective dates on which those events actually occurred.

In Hansford v. United States, supra, this Court granted a §2255 motion raising the issue of competency and refused to require a nunc pro tunc determination of competency because:

"A retrospective determination of competency is difficult at best. It is virtually impossible where ... there is no contemporaneous testimony or evidence of appellant's competence at the time of trial and where his present condition ... is unquestionably different. An expert who now examined him could do no more than speculate unduly about his mental condition at his trial a year ago." (herein at p. 926)

In view of the impossibility herein of making a retrospective determination of appellant's competence to stand trial or of appellant's capacity sufficient to enter a guilty plea as such impossibility was revealed and demonstrated in the course of the evidentiary hearings conducted by the District Court, that Court erred in failing to grant appellant's motion to vacate and set aside his sentence on the ground that appellant was incompetent to stand trial and incapable of entering a guilty plea.

Accordingly, this Court must now vacate and set aside appellant's sentence with instructions that a new trial should be held only if appellant is now found, after a hearing, to be competent to stand trial. Harsford v. United States, supra.

(X)

CONCLUSION

For the reasons stated above, it is respectfully submitted:

1. That appellant's sentence be vacated and set aside:
 - (a) because the evidence herein establishes that appellant was incompetent to stand trial; or
 - (b) because the evidence herein establishes that appellant was legally incapable of entering a guilty plea; or
 - (c) because insufficient evidence was available to permit a retrospective determination with respect to appellant's competence to stand trial or legal capacity for entering a guilty plea; and
2. That appellant should have such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

Harvey M. Spear, Esq.
1420 New York Avenue, N.W.
Washington, D.C. 20005
Attorney for Appellant

August , 1969

REPLY BRIEF FOR PETITIONER

United States
for the District of Columbia

FILED

Nathan
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,495

United States Court of Appeals
for the District of Columbia Circuit

FILED

JAN 21 1970

Nathan J. Paulson
CLERK

BERNARD L. MOORE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

-APPEAL TO REVIEW AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

Harvey M. Spear
1420 New York Avenue, N.W.
Washington, D.C. 20005

Attorney for Appellant

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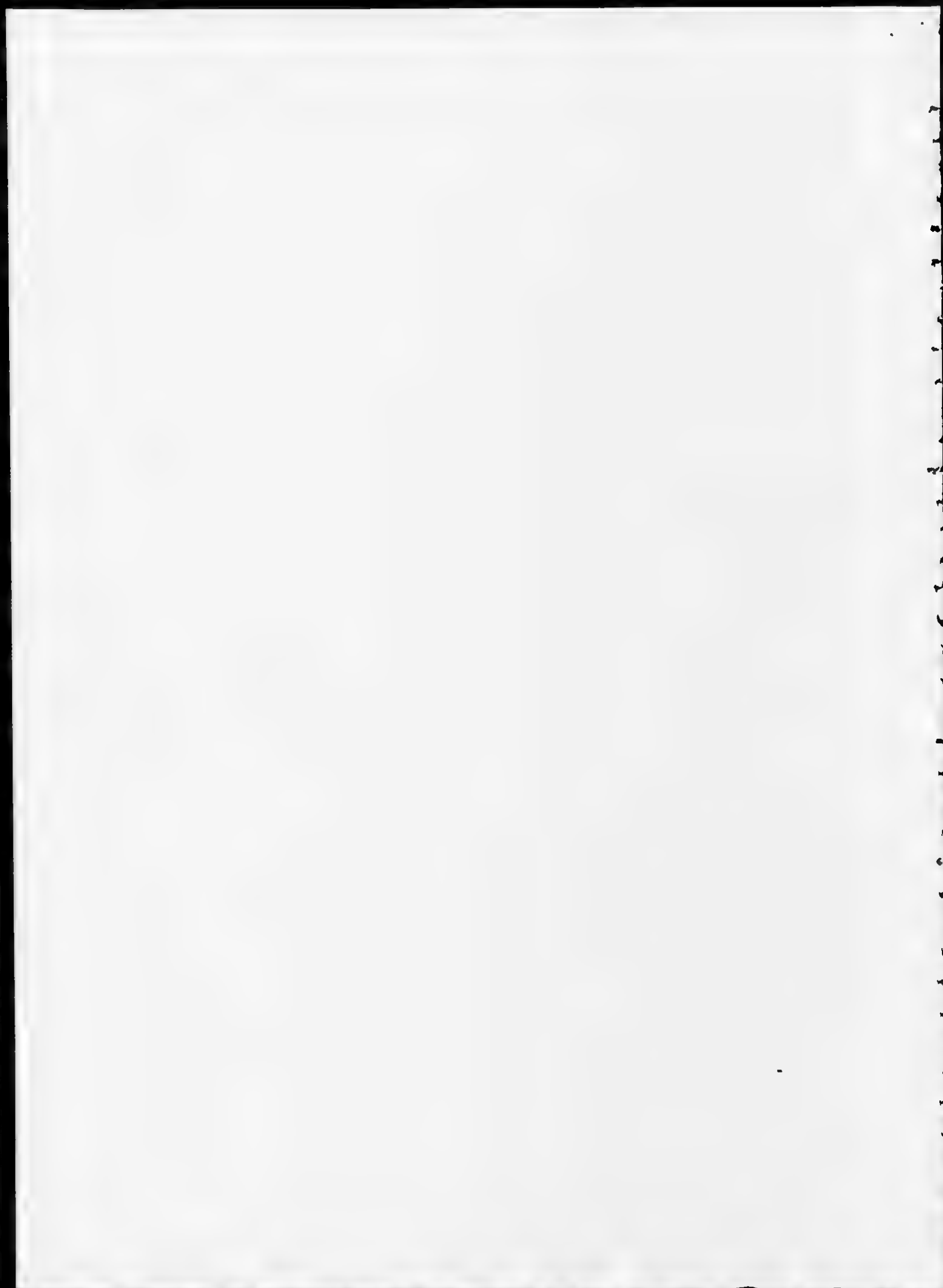
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PRELIMINARY STATEMENT

This Reply Brief is submitted by appellant, Bernard L. Moore, in response to the Brief submitted by appellee, United States of America.

The Brief of the appellee is directed toward each of the three Arguments presented by appellant in its Brief in Case No. 22,495. In these Arguments, appellant presents the reasons why (a) the District Court erred in denying appellant's \$2255 motion to vacate and set aside his sentence in light of evidence establishing appellant's incompetence to stand trial (Argument I); (b) the District Court erred in denying appellant's \$2255 motion to vacate and set aside his sentence in light of evidence establishing appellant's incapacity for exercising that "greater degree of awareness" prerequisite to the entry of a guilty plea; and (c) the District Court erred in denying appellant's \$2255 motion to vacate and set aside his sentence in light of the impossibility, under the circumstances herein, of making a retrospective determination with respect to appellant's competence to stand trial or capacity for exercising that "greater degree of awareness" prerequisite to the entry of a guilty plea. Appellant will show in this Reply Brief that his position on each of these Arguments has not been refuted.



REPLY BRIEF FOR PETITIONER

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,495

BERNARD L. MOORE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL TO REVIEW AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

Harvey M. Spear
1420 New York Avenue, N.W.
Washington, D.C. 20005

Attorney for Appellant

ARGUMENT

I

APPELLEE ERRS IN ALLEGING THAT APPELLANT HAS FAILED TO ESTABLISH THAT THE DISTRICT COURT ERRED IN FINDING APPELLANT COMPETENT TO STAND TRIAL.*

Appellee alleges in its Brief that the findings of the District Court made at the conclusion of the evidentiary hearing held on May 3 and June 28, 1968 with respect to appellant's competence to stand trial "should not be disturbed, for they are supported by abundant evidence and are certainly not 'clearly erroneous.'" Appellee is in error in that the psychiatric and medical testimony adduced at the evidentiary hearing together with the testimony of appellant with respect to his comprehension of the trial proceedings establish that appellant was incompetent to stand trial in September 1963.

- A. Appellee errs in alleging that the psychiatric testimony given and the medical evidence adduced at the evidentiary hearing fail to establish appellant's incompetence at the time of trial.

Appellee is in error in alleging that the psychiatric testimony given and the medical evidence adduced at the evidentiary hearing fail to establish appellant's incompetence at the

* With respect to Argument I, appellant desires that the Court read the following pages of the transcripts: Trial Tr. 6, 65-66, 81-82, 87, 90, 95, 123-125, 155-160, 167-169, 179, 204-207, 245-269, 281-284, 292 and 298; September 18, 1963 Tr. 6; November 1, 1963 Tr. 1 and 4-6; December 20, 1963 Tr. 9, 17, 50-51 and 64; May 3 and June 28, 1968 Tr. 1-170.

time of trial.

Dr. Baughman, appellant's psychiatrist at the time of the evidentiary hearing, diagnosed appellant in July 1966 as schizophrenic reaction, chronic undifferentiated type. (~~September~~ ^{June} 28, 1968 Tr. 83). He testified at the evidentiary hearing as to his belief that appellant's mental condition declined during the period intervening between the April 1963 staff conference finding with respect to appellant's competency and the trial of appellant in September 1963. (~~September~~ ^{June} 28, 1968 Tr. 93). Although appellee cites in its Brief, Dr. Baughman's testimony with respect to his inability to determine if appellant were competent to stand trial in September 1963 (~~September~~ ^{June} 28, 1968 Tr. 90-91, 100), appellee ignores Dr. Baughman's affirmation that appellant's behavior prior to, during and subsequent to his trial was consistent with and characteristic of one diagnosed as schizophrenic reaction, chronic undifferentiated type. (~~September~~ ^{June} 28, 1968 Tr. 110). Appellee also alludes in its Brief to the diagnosis of Dr. Mould, in August 1964, characterizing appellant as schizophrenic reaction, chronic undifferentiated type. However, appellee fails to mention in its Brief that Dr. Baughman testified at the evidentiary hearing to his belief in the correctness of that diagnosis (~~September~~ ^{June} 28, 1968 Tr. 93) and further testified that Dr. Mould's use of the word "chronic" indicated that appellant had been so ill for a period of at least six months to a number of years prior to August 1964, the date when such diagnosis was made. (~~September~~ ^{June} 29, 1968 Tr. 105).

Appellee states in its Brief that Dr. Stammeyer testified at the evidentiary hearing that he believed appellant to be

mentally ill at the time of the April 9, 1963 conference at St. Elizabeths Hospital wherein appellant was found competent to stand trial (~~September~~ ²¹28, 1968 Tr. 120). However, appellee ignores in its Brief the testimony of Dr. Stammeyer with respect to the symptoms of appellant's mental illness which necessarily affected appellant's capacity to understand the nature of the charges brought against him and the nature of the trial itself. Dr. Stammeyer testified at the evidentiary hearing that appellant exhibited a marked inability to exercise independent judgment in all circumstances and an inability to exercise reasonable judgment in his own best interest (~~September~~ ²¹28, 1968 Tr. 120). Although Dr. Stammeyer testified as to his belief that appellant was competent in April 1963 (~~September~~ ²¹28, 1968 Tr. 121), he further testified that he had no way of knowing whether appellant was competent to stand trial in September 1963, the date when, in fact, appellant's trial took place. (~~September~~ ²¹28, 1968 Tr. 124). Further, Dr. Stammeyer did not testify that the evidence adduced at the evidentiary hearing had altered his opinion with respect to appellant's mental condition subsequent to the April 1963 staff conference at St. Elizabeths Hospital as appellee's Brief implies. Dr. Stammeyer testified only that nothing in the testimony given at the evidentiary hearing had altered his conclusion with respect to appellant's competence as of April 9, 1963, the date of the staff conference at St. Elizabeths Hospital, more than five months prior to appellant's trial.

Appellee only cursorily discusses in its Brief the testimony given by Dr. Dabney at the evidentiary hearing. Dr.

Dabney testified at the evidentiary hearing that the information presented to the conferees at the April 1963 staff conference at St. Elizabeths Hospital was insufficient and could not serve as an adequate basis for a determination as to appellant's competence. ^{Rein} (September 28, 1968 Tr. 132-133) Dr. Dabney subsequently filed a dissenting opinion with respect to appellant's competence but such opinion was not included in the April 10, 1963 staff conference report. ^{Rein} (September 28, 1968 Tr. 135). Dr. Dabney further testified that the high dosage of drugs prescribed for and used by appellant immediately prior to the April 1963 staff conference at St. Elizabeths indicates that, at that time, appellant was "markedly agitated and disturbed." ^{Rein} (September 28, 1968 Tr. 137). Dr. Dabney testified that had all the information available at the evidentiary hearing been accessible to him in April 1963, he would have found appellant incompetent. ^{Rein} (September 28, 1968 Tr. 138). Dr. Dabney further testified that the conduct of appellant subsequent to April 1963 and specifically during his trial in September indicated that appellant was incompetent at the time of his trial. Appellant's behavior was characterized by Dr. Dabney as "self-defeating" and "bizarre". ^{Rein} (September 28, 1968 Tr. 141). With respect to Dr. Mould's August 1964 diagnosis that appellant suffered from schizophrenic reaction chronic undifferentiated type, Dr. Dabney testified that nine out of ten individuals so diagnosed are found to be incompetent. ^{Rein} (September 28, 1968 Tr. 140). Further, Dr. Dabney testified that Dr. Mould's use of the word "chronic" indicates that appellant had been so ill for a period of at least a year prior to the time such diagnosis was made. ^{Rein} (September 28, 1968 Tr. 135). Appellee in its Brief states

that the testimony given by Dr. Dabney conflicts explicitly with that of Dr. Platkin who testified that even if appellant were mentally ill, it did not necessarily follow that he was incompetent to stand trial. However, appellee is in error in that Dr. Dabney in his testimony at the evidentiary hearing never equated mental illness with incompetence. The psychological study to which Dr. Platkin referred in his testimony, as indicated by appellee in its Brief (~~September~~^{Tr. in} 28, 1968 Tr. 156), was not that of Dr. Dabney but that of Dr. Stammeyer who, likewise did not equate mental illness with incompetence to stand trial.

Dr. Platkin, the sole witness who testified on behalf of appellee at the evidentiary hearing, agreed that "there was no way of knowing from the medical testimony available" if appellant were competent at the time of his trial in September 1963. (~~September~~^{Tr. in} 28, 1968 Tr. 167). Although Dr. Platkin testified that appellant's conduct was not so bizarre as to support the conclusion that he was incompetent, Dr. Platkin's refusal, after constant prodding by counsel for appellant, to affirmatively state that appellant was competent demonstrates the weakness of appellee's case.

Based upon the testimony of Drs. Baughman, Stammeyer, Dabney, and Platkin at the evidentiary hearing held on May 3 and June 28, 1968, appellant must prevail. For Drs. Baughman, Stammeyer, and Platkin testified only to their inability to determine if appellant were competent at the time of his trial, while Dr. Dabney, having testified to appellant's incompetence at the time of his trial in September 1963, proved appellant's contention by a preponderance of the evidence adduced at the evidentiary hearing. Appellee, therefore, is in error in alleging that appellant

has failed to establish his incompetence to stand trial. In the evidentiary hearing below, the District Court was in error in finding appellant competent at the time of his trial.

Appellee alleges in its Brief that the deterioration of appellant's mental condition in the intervening five months between the April 1963 St. Elizabeths Hospital staff conference finding with respect to appellant's competency and the trial of appellant in September 1963 is totally unsupported by the record. However, in its discussion of the testimony of the witnesses given at the evidentiary hearing held with respect to appellant's competency, appellee overlooks the fact that medical evidence contemporaneous with appellant's trial is entirely lacking and appellee ignores all the medical evidence of record subsequent to April 1963, some of which is more proximate in date to appellant's trial than the April 1963 staff conference report. The finding of competency made in April 1963, more than five months before the commencement of appellant's trial, and from which Dr. Dabney dissented in a report first brought to the trial judge's attention two days after the commencement of such trial, certainly is of less significance to the issue of appellant's competency at the time of his trial than documentary evidence more proximate to the trial date. See Blunt v. United States, 128 App. D.C. 375, 389 F.2d 545 (1967).

Less than two months after the conclusion of appellant's trial and appellant's entry of a guilty plea, Mr. Jesse Jones, Classification Officer, on December 17, 1963, in the medical report most contemporaneous in time with appellant's trial, characterized appellant's behavior as "self-defeating, illogical, pleasure-oriented . . . with little insight or motivation to improve"

(Exhibit 13). This medical report most clearly fixes the deterioration in appellant's mental condition from April 9, 1963 and establishes appellant's inability to aid in his own defense at the time of his trial.

On April 21, 1964, the Assistant Superintendent of Security at Lorton requested that appellant "be referred for psychiatric examination due to his irrational behavior."

(Exhibit 14). On May 21, 1964, the Acting Superintendent at Lorton, having been advised by the Senior Medical Officer that appellant was not "in command of all his faculties", questioned appellant's sanity and requested that Legal Psychiatric Services evaluate appellant's mental condition. (Exhibits 15, 16, 17).

On August 6, 1964, (only five weeks after the trial court denied appellant's first motion to withdraw his guilty plea and less than eight months after appellant's amended sentence was entered), Dr. Mould diagnosed appellant as "Schizophrenic Reaction, chronic undifferentiated type" and recommended that appellant be readmitted to St. Elizabeths Hospital. There, on January 2, 1965, Dr. Mould's diagnosis was confirmed by Dr. Straty Economon who nevertheless described appellant as "better integrated at the present time than he has been in recent years." (Exhibit 23).

Appellee argues that since the April 9, 1963 report found appellant to be competent to stand trial, it must be assumed that he was competent at the time of his trial in September 1963. At the evidentiary hearing below, the District Court agreed with appellee notwithstanding all of the evidence to

the contrary submitted by appellant at such hearing. Appellant submits, however, that even though there might be evidence in the record below from which one might argue that appellant was competent in April 1963, all of the evidence relating to the time subsequent to April 1963 points clearly to appellant's incompetence by the time of his trial in September 1963. Alternatively, appellant submits them even if one cannot make a positive finding of incompetence as of September 1963, it is equally true that one cannot make a positive finding of competence as of September 1963. As still another alternative, if one concludes that one cannot positively find incompetence as of September 1963, then it would be because of the impossibility of making a retrospective determination under the circumstances herein. In any event, it is clear from the record that the District Court erred at the evidentiary hearing in making a positive finding that appellant was, in fact, competent in September 1963.

Appellee further alleges in its Brief that appellant's own admissions as to his awareness of the charges brought against him, of his assistance by counsel (^{See} ~~September~~ 28, 1968 Tr. 74),

and of the penalties for first and second-degree murder (September 28, 1968 Tr. 80-81), his recall of his filing a motion to dismiss the indictment for lack of a speedy trial and of his testimony at the suppression hearing during his trial, all establish that "he was competent in accordance with the standard enunciated in Dusky v. United States," 362 U.S. 402, 4 L. Ed. 2d 824, 80 S. Ct. 788 (1960). However, in Dusky v. United States, the Court, quoting a suggestion of the Solicitor General, said:

"... it is not enough . . . that 'the defendant [is] oriented to time and place and [had] some recollection of events'. . . ." (Emphasis added) 362 U.S. at 402, 4 L. Ed at 825, 80 S. Ct. at 788, 789.

Thus, appellant's awareness and recollection of events which occurred in the past and were incident to the proceedings of his trial are not sufficient to establish his competency under the standard prescribed in Dusky v. United States, supra, and appellee is in error in alleging such to be the case.

It is of far greater significance with respect to the issue of appellant's competence to stand trial that appellant was incapable of consulting with and aiding counsel in his defense due to his own ignorance of and inability to appreciate certain defenses which were available to him. Although appellant cited such instances in its Brief, appellee failed to discuss in its Brief, appellant's ignorance of the existence of a dissenting report to the St. Elizabeths staff conference finding with respect to his competence to stand trial (May 3, 1968 Tr. 45), of his right to request a hearing on his competence to stand trial (May 3, 1968 Tr. 45), of his right to request a hearing with respect to whether he was insane at the time of the commission of

the crime with which he was charged and to which he entered a guilty plea (May 3, 1968 Tr. 45), of his right to raise the possible defense of his intoxication at the time of the commission of the crime with which he was initially charged (May 3, 1968 Tr. 46), of his right to appeal the issue of intoxication to the Court of Appeals subsequent to his entering a guilty plea to the charge of manslaughter (May 3, 1968 Tr. 46). All these factors weigh in favor of appellant's incapacity for understanding the nature of the charges brought against him and appellant's inability to aid counsel in his own defense.

B. Appellee errs in alleging that appellant's incompetence at the time of his trial is unsupported by the record.

Appellee alleges in its Brief that appellant's incompetence at the time of his trial is "totally unsupported by the record." However, appellee in its Brief totally ignores the behavior of appellant prior to, at, and subsequent to his trial up to and including the time he entered his guilty plea. The behavior which appellant exhibited during this period attests to his mental deterioration and ought to have prompted the trial judge to order, sua sponte, a hearing on appellant's competence to stand trial.

Upon three different occasions, between July 24, 1963 and September 3, 1963, appellant filed pro se motions to dismiss the indictment against him for denial of a speedy trial. Upon each occasion such motions were denied. (Supplemental Record).

On September 16, 1963, at the commencement of appellant's trial, appellant's counsel advised the court that appellant would raise the defense of his insanity at the time of the commission of the alleged crime. However, no question was raised by the trial judge with respect to appellant's competency and the April 10, 1963 St. Elizabeths staff conference report with respect to appellant's competency was submitted to the court without formal objection by appellant's counsel.

During appellant's trial, the court was advised that appellant had requested "medical treatment for his head", thereafter "medical treatment and hospitalization", and that appellant was receiving aspirin for relief of his pain (Trial Tr. 6, 81).

On September 17, 1963, the second day of appellant's trial, the trial judge was advised that appellant had previously refused to plead guilty to manslaughter, and appellant reaffirmed that to be his position. (Trial Tr. 123-125). Appellant's written confession, obtained on September 10, 1962, was that day introduced in evidence. (Trial Tr. 280-284). Earlier, appellant's sister, testified about appellant's lapses of memory, headaches, and mental deficiencies (Trial Tr. 157).

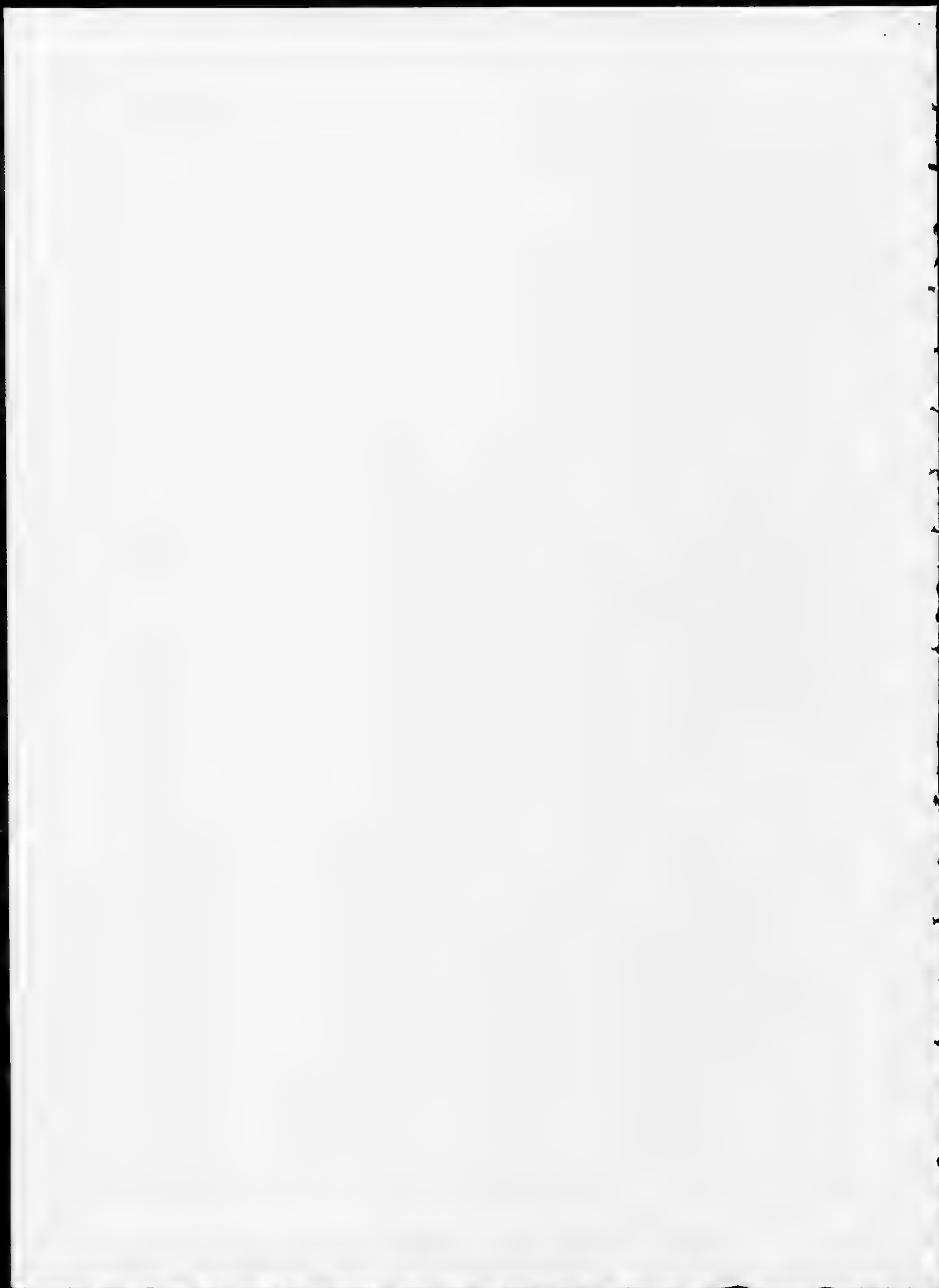
On September 18, 1963, the third day of trial, and prior to the presentation of appellant's case, the trial judge was advised that appellant wished to plead guilty to manslaughter. He was further advised that appellant's counsel had that morning learned of the existence of a minority dissenting report to the St. Elizabeths staff conference competency finding. The trial judge without reference to such report thereafter permitted appellant to enter a guilty plea (Trial Tr. 298) in spite of appellant's

confusion as to the time when the commission of the crime was alleged to have occurred. (September 18, 1963 Tr. 6). No inquiry was made by either the trial judge or appellant's counsel with respect to what had prompted appellant to change his plea in light of his previous refusal to do so. (September 18, 1963 Tr. 1-11 and December 20, 1963 Tr. 50, 64).

Prior to his sentencing, appellant twice requested that his guilty plea be withdrawn. But on the very morning that the trial judge was informed of appellant's requests, appellant retracted his requests for withdrawal of his guilty plea and advised the trial judge that he desired immediate sentencing (November 1, 1963 Tr. 1, 4 and December 20, 1963 Tr. 9-10). Neither the trial judge nor appellant's counsel inquired into the motivation behind appellant's vacillation (November 1, 1963 Tr. 1-8 and December 20, 1963 Tr. 66-67).

Appellant requested that the trial judge send him to a "mental hospital" in response to the judge's inquiry if he had anything to say before he was sentenced. The trial judge responded that this was a matter for "the authorities" (November 1, 1963 Tr. 4) and, upon being advised, for a second time, of the existence of a dissenting report to the St. Elizabeths staff conference finding with respect to appellant's competency, the trial judge made no further inquiry into the question of appellant's competence to stand trial. He sentenced appellant. (November 1, 1963 Tr. 4-8).

The behavior of appellant, as summarily described above, documents the instability of mind under which appellant labored at



the time of his trial. Such behavior was sufficiently erratic to have awakened the trial judge to the necessity for determining in September, in November, or in December 1963 whether appellant was on each of those respective occasions competent to stand trial or capable of entering a guilty plea. Instead of ordering, sua sponte, a hearing with respect to appellant's competency, the trial judge chose to rely upon an April 10, 1963 determination which he had been twice advised was inconclusive and subject to serious question.

Appellee is in error when it states in its Brief that the record is devoid of evidence of appellant's incompetence at the time of his trial. Rather, the record is replete with evidence which establishes appellant's incompetency during September through December 1963.

ARGUMENT

II

APPELLEE ERRS IN ALLEGING (A) THAT APPELLANT CANNOT HERE RELITIGATE THE ISSUE OF APPELLANT'S CAPACITY TO ENTER A GUILTY PLEA, AND (B) THAT IN ANY EVENT APPELLANT HAD THE NECESSARY CAPACITY TO ENTER A GUILTY PLEA.*

Appellee in its Brief alleges (a) that appellant cannot here relitigate the issue of appellant's capacity to enter a guilty plea, and (b) that in any event appellant had the necessary capacity to enter a guilty plea. Appellee is in error in that the issue of appellant's capacity to enter a guilty plea is not being relitigated in this action. Assuming arguendo that such were the case, appellant's right to so relitigate the issue has been sanctioned by this Court. Moore v. United States, Case Nos. 19,901, 20,937. Appellee is in further error in alleging that appellant had the necessary capacity to enter a guilty plea in that the testimony given at the evidentiary hearing, together with the medical evidence adduced therein, establish that appellant lacked the mental capacity required to enter a guilty plea.

A. Appellant is not relitigating the issue of his capacity to enter a guilty plea in this action; assuming arguendo such to be the case, this Court has sanctioned the relitigation of the issue.

Appellee in its Brief alleges that the issue of appellant's capacity to enter a guilty plea is not subject to relitigation in this action, it having previously been held that

* With respect to Argument II, appellant desires that the Court read those pages of the transcripts indicated with respect to appellant's Argument I herein.

appellant's plea was "voluntary and intelligent", and such ruling having been affirmed by this Court in Moore v. United States, D.C. Cir. No. 18,814, decided December 28, 1964.

Whether or not appellant's capacity to enter a guilty plea was an issue disposed of in Case No. 18,814 and, if so, whether such issue could be relitigated, were questions which were briefed and argued before this Court in Case Nos. 19,901 and 20,937 by the same parties to this action. In Case Nos. 19,901 and 20,937, appellant herein showed that his motion of November 7, 1963 to withdraw his guilty plea, which was the subject of Case No. 18,814, was a motion brought under Rule 32(d) of the Federal Rules of Criminal Procedure, and not brought under 28 U.S.C. §2255. Although the trial judge stated that he would treat the November 7, 1963 motion as a §2255 motion (December 20, 1963 Tr. 5-6), the Findings of Fact and Conclusions of Law filed on June 30, 1964 in support of the denial of this motion do not contain any such recital (Supplemental Record). Thus, appellant showed that the provisions of §2255 had never before been invoked by him and such invocation in Case Nos. 19,901 and 20,937 did not constitute relitigation of the issue of appellant's capacity to enter a guilty plea under §2255.

Appellant further showed in Case Nos. 19,901 and 20,937, that even if appellant's November 7, 1963 motion were held to have been brought under §2255 and to have been disposed of in Case No. 18,814, that the Supreme Court decision in Sanders v. United States, 373 U.S.1, 10 L. Ed. 2d 148, 83 S. Ct. 1068 (1963) controlled

appellant's right to relitigate the issue of his capacity to enter a guilty plea. In Sanders v. United States, supra, the Supreme Court formulated basic rules to guide the courts in determining whether a hearing should be held on a subsequent §2255 motion for similar relief. The Supreme Court there held that a District Court must consider a successive §2255 application for similar relief based upon the same ground if the applicant could "show that the ends of justice would be served by permitting the redetermination of the ground." Said the Court:

"If factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair;...."
373 U.S. at 16, 10 L. Ed. 2d at 162, 83 S. Ct. at 1078.

This Court accepted appellant's argument in Case Nos. 19,901 and 20,937 and in an order, dated January 15, 1968, required that an evidentiary hearing be held by the District Court "on the factual allegations contained in the affidavits filed in support of appellant's Section 2255 motion, and that the District Court file findings of fact and conclusions of law on the issue of appellant's competence to enter his plea of guilty." This Court, explicitly referring to Sanders v. United States, supra, stated that the facts alleged in the affidavits of appellant's counsel and Dr. Dabney, many of which had not previously been before the Court could, if proved, raise "a substantial question as to appellant's competence to enter a plea of guilty."

Pursuant to this Court's order, evidentiary hearings were held on May 3 and June 28, 1968 for the purpose of determining "appellant's competence to enter a plea of guilty." This ap-

peal is taken directly from the District Court's finding, specifically referred to by appellee in its Brief, that appellant had the requisite mental capacity to enter a guilty plea. Thus, appellee is clearly in error in its Brief in alleging that appellant may not "relitigate" the issue of appellant's capacity to enter a guilty plea. Appellant is merely following the dictate of this Court which requires a full exposition of this issue.

B. Appellant lacked the requisite mental capacity to enter a guilty plea.

Appellee alleges in its Brief that appellant has failed to establish that he lacked sufficient mental capacity to enter his plea, and appellee cites in support of this contention (a) the trial judge's belief, expressed on May 8, 1964, at a hearing on appellant's §2255 motion to withdraw his guilty plea, that appellant was "very fortunate" (May 8, 1964 Tr. 8) and "lucky" to be able to plead guilty to manslaughter, and (b) the same trial judge's opinion, expressed immediately upon the conclusion of the evidentiary hearing, to the effect that appellant "showed exceedingly good judgment" in pleading guilty to a lesser charge (September 28, 1968 Tr. 168-169).

At the hearing held on May 8, 1964 on appellant's §2255 motion to withdraw his guilty plea, the trial judge, in commenting upon appellant's guilty plea to the charge of manslaughter, stated:

"... but I remember the case very well. I don't think he had to kill her. I think he could have prevented it if he wanted to. I just cannot see that he is entitled to this relief." (Emphasis added) (May 8, 1964 Tr. 9).

At the conclusion of the evidentiary hearing ordered by this Court for the purpose of making an independent determination with respect to appellant's competence at the time of his trial, the same* trial judge stated:

"I remember this case very well. First of all, it was a brutal murder. This man is lucky and I should think he showed exceedingly good judgment by accepting the government's offer for him to plead guilty to manslaughter. . . . So I have a right to consider my recollection of all the evidence and all of the factors in the case" (Emphasis added) (September 28, 1968 Tr. 168).

As this Court explicitly recognized in its order requiring an evidentiary hearing, "a substantial portion of the facts alleged in [the affidavits of appellant's counsel and Dr. Dabney] may not have been before the court at the time appellant's plea of guilty was accepted by the court." Such facts were presented in great detail to the trial judge at the evidentiary hearing before the District Court below at which three psychiatrists, a psychologist, and the appellant testified. That testimony took up the greater portion of two days. It is submitted by the appellant that the expressions of opinion by the District Judge given immediately upon the conclusion of the evidentiary hearing, exemplified by comments which so closely paralleled previous remarks made by the same trial judge on May 8, 1964, some four years before, indicates that no new independent judgment was exercised by the District Court below at the conclusion of the evidentiary hearing with respect to

* At the evidentiary hearing below, the same District Judge presided as presided at appellant's trial.

appellant's competence at the time of his trial.

Appellee alleges in its Brief that the finding of the trial judge was not clearly erroneous. The proof which appellee marshals in support of its contention consists of a number of inferences which it draws from appellant's testimony and the record of the actual trial proceedings. In brief, appellee contends that appellant pled guilty to manslaughter only after appellee had rested its case; that appellant pled guilty to manslaughter out of fear that a harsher sentence might be meted out against him; that upon receiving the maximum sentence for manslaughter, appellant sought to retract his plea; that appellant pled guilty to manslaughter upon advice of trial counsel; and that appellant's plea consisted of wise trial strategy. In support of each of these inferences, appellee cites as authority various cases wherein similar inferences were drawn. So that in United States ex rel. Lo Piccolo v. La Vallee, 377 F.2d 221 (2d Cir. 1967), cited by appellee, the court there recognized that a defendant might be motivated to plead guilty to manslaughter out of fear of suffering the punishment for murder. And in Bartlett v. United States, 354 F.2d 745, 751 (8th Cir.) cert. denied, 384 U.S. 945 (1966), also cited by appellee, it was noted by the court that dissatisfaction with a sentence might be a factor in a defendant's request to withdraw a guilty plea which he had previously entered voluntarily and with understanding.

Appellee in its Brief, however, fails to show any basis for applying the principles stated in each of the cases it cites to the circumstances surrounding appellant's entry of a guilty plea to the charge of manslaughter and his subsequent efforts to withdraw that plea.

Appellee ignores in its Brief much of the psychiatric

testimony which was given by Drs. Stanmeyer and Dabney at the evidentiary hearing and which appellant cites in support of its argument that appellant lacked the mental capacity requisite to the entry of a guilty plea. As stated by appellant in its Brief, a "greater degree of awareness" is required of a defendant for the entry of a guilty plea than that which is required of him with respect to his competence to stand trial. In re Williams, 104 App. D.C. 18, 165 F. Supp. 879 (1958). The medical report of Dr. Stammeyer, dated April 6, 1963, described appellant as "helpless, indecisive, and ... prone to cling to others for support." His judgment was described as "likely to be undependable under stress." (Exhibit 7, page 2). At the evidentiary hearing Dr. Stammeyer testified to his belief that appellant was mentally ill and affirmed his previous diagnosis:

"I felt that Mr. Moore had - well, my diagnosis was of a passive dependent person. I thought this young man was pathologically dependent upon other people, that he had such a limited capacity for independent adjustment in the community that he should be considered mentally ill" (September 28, 1968 Tr. 120).

At the evidentiary hearing, Dr. Dabney also testified to appellant's mental illness and, characterizing appellant's behavior as bizarre, to his incompetence on September 18, 1963 to enter a guilty plea:

"The bizarreness of it, sir, would be the self-defeating actions of the individual, at one point wants to do this and the next moment something else, all involving a vital serious issue effecting [sic] his life and his future. It indicates to me the questionableness of his reasoning and judgment, that is, it is being impaired to the point he can't really make a determining or binding decision for his own welfare or best interests" (Emphasis added) (September 28, 1968 Tr. 140, 141).

The above testimony, cited by appellant in its Brief,

supports appellant's argument that he was incapable of entering a guilty plea "voluntarily" and of his "own free will", requirements prescribed as fundamental to the acceptance of such a plea. Resolution of the Judges of the United States District Court for the District of Columbia, promulgated June 24, 1959.

Appellant, in its Brief, did not limit its discussion of appellant's incapacity for entering a guilty plea to the testimony given at the evidentiary hearing. Appellant's discussion also encompassed an analysis of appellant's past medical history and its significance with respect to his inability to make an independent judgment in his own behalf and in his own best interest. It was emphasized that appellant was of "borderline intelligence - IQ 74" with "poor mechanical aptitudes, clerical skills lacking" and "mental age 11-4". (Exhibit 6). It was emphasized that appellant had been characterized as one of average intellectual ability but had "probably never consistently functioned much beyond the lower extreme of the dull normal range" (Exhibit 7, page 2). It was noted that appellant showed "some indications . . . consistent with the effects of early organic damage to the central nervous system" and that appellant "was prone to lose sight of his goal and occasionally his response to the performance items became outright disorganized and confused. . . ." (Exhibit 7, page 1).

Appellant further discussed in its Brief, appellant's history of injury, illness, and instability and related these among other factors to the totality of circumstances attendant to appellant's guilty plea which militated against the plea's

rightful entry. Further factors discussed by appellant in its Brief involved (1) appellant's confession; (2) appellant's vacillation with respect to his plea; (3) the affect of the inducement of a manslaughter plea on appellant; and (4) the trial court's failure to adequately investigate appellant's capacity for so pleading.

Appellant has established through the testimony and medical evidence adduced at the evidentiary hearing, that appellant was incapable of exercising that "greater degree of awareness" requisite to the entry of a guilty plea. Appellee is in error in alleging that the finding of the District Court that appellant was competent to enter a guilty plea is not clearly erroneous. Appellant established by a preponderance of proof that he lacked that "greater degree of awareness" requisite to the entry of a guilty plea.

ARGUMENT

III

APPELLEE ERRS IN ALLEGING THAT NO RELIEF SHOULD BE GRANTED BECAUSE APPELLANT HAS FAILED TO ESTABLISH APPELLANT'S INCOMPETENCE AT THE TIME OF TRIAL.*

Appellee alleges in its Brief that no relief should be granted because appellant has failed to establish appellant's incompetence at the time of trial. In so alleging, appellee fails to give recognition to the following statement by this Court in its Judgment of January 15, 1968 in which this case was remanded to the District Court:

"On consideration whereof, and it appearing that in connection with his Section 2255 motion appellant filed in the District Court affidavits executed by appellant's counsel and Dr. Dabney alleging facts which if proved may raise a substantial question as to appellant's competence to enter a plea of guilty;" (Underscoring supplied)

Appellant submits that this Court has already indicated its view on the test to be applied when this Court referred to "facts which if proved may raise a substantial question as to appellant's competence." (Underscoring supplied) Accordingly, appellant believes appellee errs in arguing that appellant must prove appellant's incompetence. Appellant submits that appellant need only

* With respect to Argument III, appellant desires that the Court read those pages of the transcripts indicated with respect to appellant's Argument I herein.

prove that "a substantial question as to appellant's competence" existed in order to obtain the relief appellant seeks herein.

Appellee appears to disagree with appellant's Argument III in appellant's Brief in which appellant states that the District Court below herein should have ordered a new trial not only because of the "substantial doubt" as to appellant's competence at the time of the trial but also because of the impossibility, under the circumstances herein, of making a retrospective determination as to appellant's competence.

As to the issue of the retrospective determination impossibility, appellee in effect argues that this issue has no relevance to this proceeding because it can not be raised in a §2255 appeal but can only be raised on a direct appeal. Appellee bases its argument on the theory that there are different burdens of proof between direct appeals and §2255 appeals.

Appellee is in error in believing that the difference in burden of proof between the two types of appeals defeats appellant's argument with respect to the impossibility of making a retrospective determination as to appellant's competence in that appellant's argument is itself predicated upon the stricter standard of proof cited by appellee.

Moreover, appellee fails to substantiate its

allegation that the evidence adduced at the evidentiary hearing was sufficient to permit a nunc pro tunc determination of appellant's competence at the time of his trial.

Finally, appellee fails to respond in its Brief to appellant's argument that, in the light of the substantial doubt raised as to appellant's competence at the time of the trial, the trial court erred in failing to conduct, sua sponte, a hearing with respect to appellant's competency.

- A. Appellant is only required to show that "a substantial question as to appellant's competence" existed at the time of the trial.

In its Judgment dated January 15, 1968 this Court has directed that the District Court determine whether, at the time of Appellant's trial, "a substantial question [existed] as to Appellant's competence to enter a plea of guilty." Appellant has shown in its Brief that it has proved the existence of a "substantial question" with respect to appellant's competence at the time of his trial. The existence of such a "substantial question" should have caused the District Court below herein to order a new trial.

B. Alternatively, appellant is only required to show by a "preponderance of proof" that a retrospective determination as to his competence at the time of trial or plea is clearly impossible.

Appellee alleges in its Brief that appellant has failed to satisfy the burden of proof required for a trial court to vacate and set aside appellant's sentence in the case of a retrospective determination. In support of its contention, appellee undertakes a lengthy analysis with respect to the distinction between the burden of proof required for direct appeal (i.e. for a trial court, sua sponte, to hold a competency hearing as to a defendant's competence to stand trial) and the burden of proof required for a trial court in a collateral proceeding to vacate and set aside a sentence on the ground that a defendant was incompetent at the time of trial or plea. Appellee urges that the former case requires only that defendant establish the existence of a "substantial doubt" as to his competence to stand trial, while in the latter instance, defendant must establish by a "preponderance of the evidence" that he was incompetent to stand trial or enter a guilty plea.

For the purpose of deciding whether a retrospective determination can be made, appellant does not take exception to this statement of the standard of proof required of him.

Appellant submits that appellant has in fact

established by a "preponderance of the evidence" that it is impossible for a trial court now to make a retrospective determination as to his competence at the time of his trial. Inasmuch as appellant accepts appellee's standard of the burden of proof (i.e. "preponderance of evidence") and inasmuch as by such standard appellant has proved the impossibility of the retrospective determination of appellant's competence, appellant's sentence should be vacated and a new trial granted. Pouncey v. United States, 121 App. D.C. 264, 349 F.2d 699 (1965), and Hansford v. United States, 124 App. D.C. 387, 365 F.2d 920 (1966). In Hansford, this Court explicitly held that a new trial should be conducted if it were impossible to make a retrospective determination of a defendant's competence at the time of his trial, saying:

"A retrospective determination of competency is difficult at best. It is virtually impossible where . . . there is no contemporaneous testimony or evidence of appellant's competence at the time of trial and where his present condition . . . is unquestionably different." 124 App. D.C. at 393, 365 F.2d at 926.

Appellee argues that, notwithstanding the Pouncey and Hansford cases, a trial court is not required to grant relief when a defendant establishes that it is, in fact, impossible for the trial court to make a retrospective determination with respect to his competence at the time of his trial or plea. Appellee is in error. The cases which appellee cites in support of its contention are

clearly distinguishable. In support of its argument, appellee cites United States v. Tom, 340 F.2d 127 (2d Cir. 1965); Holmes v. United States, 323 F.2d 430 (7th Cir. 1963), cert. denied, 376 U.S. 933 (1964); United States v. Bostic, 206 F. Supp. 855 (D.D.C. 1962), aff'd, 115 App. D.C. 79, 317 F.2d 143 (1963); and Mordecai v. United States, 252 F. Supp. 694 (D.D.C. 1966).

United States v. Tom, supra, is distinguishable in that the impossibility of making a retrospective determination with respect to the competency of defendant therein was never at issue since ample evidence existed contemporaneously with his trial as to his competence to stand trial and enter a plea. The same issue was never passed upon in Holmes v. United States, supra, where the competency of defendant at the time of his trial was substantiated retrospectively by the subsequent testimony of a medical witness.

United States v. Bostic, supra, is clearly distinguishable in that there the competency of defendant at the time of his trial was attested to by a psychiatrist who had conducted an examination of defendant on his behalf "a few days before the original trial". Mordecai v. United States, supra, may also be distinguished in that the court, while holding that defendant could demand no more than a nunc pro tunc hearing on the issue of his incompetency, never addressed itself to the issue of what relief

would be granted if the trial court found that a nunc pro tunc determination with respect to defendant's competency could not be made.

For the reasons spelled out above the cases cited by appellee on the retrospective determination issue are not relevant to the Pouncey and Hansford holdings, and accordingly, it is sufficient for appellant to establish the impossibility of a retrospective determination which appellant has done. Inasmuch as appellant has established, by whatever standard of proof is required, that it is impossible for the District Court below herein to make a retrospective determination with respect to his competence at the time of his trial, this Court must vacate appellant's sentence and grant him a new trial.

C. As a factual matter appellant has established, by a preponderance of the evidence, that it is impossible to make a retrospective determination as to appellant's competence at the time of his trial and plea.

In the above point, appellant stated that he has proved, by a preponderance of the evidence the impossibility of making a retrospective determination of his competence at the time of his trial.

The evidence in the record below which justifies this statement is as follows: (a) there was no medical examination of appellant during the nine-month period subsequent to the finding of competence contained in the St. Elizabeths staff conference

report of April 10, 1963 - a period which included appellant's trial (September 16-18, 1963), sentence (November 1, 1963), and amended sentence (December 17, 1963); (b) there was no evidence in the record of any medical examination undertaken in connection with appellant's trial and sentencing;* (c) all the medical reports concerning appellant, subsequent to his trial and sentencing, reflect a degree of mental illness which would preclude a finding of appellant's competence to stand trial or of appellant's capacity to enter a guilty plea, as of the date of such reports; (d) the testimony of Drs. Baughman, Stammeyer, and Platkin at the evidentiary hearing held with respect to appellant's competence at the trial is all to the effect that there is no way of knowing whether appellant was, in fact, competent to stand trial on September 16, 1963, or, in fact, legally capable of entering a plea of guilty on September 18, 1963; (e) the testimony of Dr. Dabney at such evidentiary hearing attested to the fact that appellant was incompetent at the time of his trial.

The evidence of record cited above, together with the testimony of the witnesses given at the evidentiary hearing held pursuant to the order of this Court,

* Appellant reiterates in its Brief that the December 17, 1963 report of Mr. Jesse Jones (Exhibit 17), which refers to appellant's "pathological functioning", is the medical report of record which was most contemporaneous in time with appellant's trial and sentencing.

establish, by a preponderance of the evidence, that it is impossible for a trial court to make a retrospective determination as to appellant's competence at the time of his trial or plea. Appellee is, therefore, in error in alleging that the evidence adduced at the evidentiary hearing held with respect to appellant's competence at the time of his trial is sufficient to make such a retrospective determination. Appellee is further in error in alleging that the trial judge's finding that appellant was competent at the time of his trial is not "clearly erroneous."

For the reasons stated above, appellee errs in alleging that no relief should be granted because appellant has failed to establish appellant's incompetence at the time of trial.

CONCLUSION

For the reasons stated above, it is respectfully submitted:

1. That appellant's sentence be vacated and set aside; and
2. That appellant should have such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

Harvey M. Spear, Esq.
1420 New York Avenue, N.W.
Washington, D.C. 20005
Attorney for Appellant

CERTIFICATE OF SERVICE

I, HARVEY M. SPEAR, attorney for Appellant, hereby certify that on January 26, 1970, I served the attached Brief upon the United States Attorney, attorney for Appellee, by depositing a copy thereof in the United States mails, postpaid, addressed to the United States Attorney at the United States Court House Building, 3rd and Constitution Avenues, N.W., Washington, D.C.

Additional copies of the foregoing Brief, with no substantive changes, will be filed with the Court and served upon the above counsel, within ten days.


HARVEY M. SPEAR

Attorney for Appellant
Office and P. O. Address
1420 New York Avenue, N.W.
Washington, D.C. 20005

Telephone: 835-5080

January 26, 1970